Supreme Court
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No.

IN THE
Supreme Court of the United States

GREGORY T. HARWOOD,
Petitioner

v.

STATE OF TENNESSEE

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law that criminalizes the possession of drawings, photographs, and other materials that depict a minor engaged in sexual or simulated sexual activity, with statutory language which permits an inference that a participant is a minor, is unconstitutionally overbroad and violates First, Fifth and Fourteenth Amendment protections as defined in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

PARTIES TO THE PROCEEDING

The Petitioner in this Court is Gregory T. Harwood.

The Respondent is the State of Tennessee.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities vii

Petition for a Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

I. Statement of the Case 3

II. Reasons for Granting the Writ 8

A. The Tennessee Supreme Court's Decision Is Irreconcilable with This Court's Decision in *Ashcroft* 10

1. Tennessee's Statute Permits an Unconstitutional Inference that a Participant Is a Minor 10

2. Tennessee's Statutory Definition of "Material" Is Overbroad 17

B. The Tennessee Supreme Court's Decision Directly Conflicts with Other State Supreme Courts' Interpretations of *Ashcroft* 23

III. Conclusion. 25

APPENDIX
(Separate Booklet)

State of Tennessee v. Kelly Michael PICKETT and State of Tennessee v. Gregory T. HARWOOD
Opinion of Tennessee Supreme Court
Nos. M2004-00732-SC-R11-CD, M2004-01811-SC-R11-CO.
Jan. 22, 2007 . . . . . .App. 1

ORDER OF THE TENNESSEE COURT OF CRIMINAL APPEALS
State of Tennessee v. Gregory T. HARWOOD.
No. M2004-01811-CCA-R9-CO.
Application for Permission to Appeal Granted by Supreme Court
Jan. 30, 2006 . . . . . .App. 32

ORDER OF THE DAVIDSON COUNTY CRIMINAL COURT DENYING MOTION TO DISMISS INDICTMENT
State of Tennessee v. Gregory T. HARWOOD.
No. 2003-B-843.
Granted July 13, 2004 . . . . . .App. 69

ORDER OF THE DAVIDSON COUNTY CRIMINAL COURT GRANTING INTERLOCUTORY APPEAL

State of Tennessee v. Gregory T. HARWOOD.
No. 2003-B-843.
Granted July 19, 2004 . . . .App. 87

ORDER OF THE DAVIDSON COUNTY CRIMINAL COURT GRANTING MOTION FOR PERMISSION TO APPEAL AND APPLICATION FOR A STAY
State of Tennessee v. Gregory T. HARWOOD.
No. 2003-B-843.
Granted July 14, 2004 . . . . . .App. 94

HARWOOD MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW
State of Tennessee v. Gregory T. HARWOOD.
No. E2004-00359-CCA-R9-CD.
Filed May 14, 2004 . . . . . .App. 101

ORDER OF THE TENNESSEE COURT OF CRIMINAL APPEALS
State of Tennessee v. Richard Allen BUTLER and Re'Licka Dajuan ALLEN
No. M2004-01811-CCA-R9-CO.
Application for Permission to Appeal Granted by Supreme Court
Aug. 22, 2005 . . . . . . App. 136

RELEVANT TENNESSEE STATUTES

Tennessee Code Annotated

§ 39-17-1002 . . . . . App. 180

§ 39-17-1003 . . . . . App. 183

TABLE OF AUTHORITIES

United States Constitution

First Amendment. . . . . passim

Fifth Amendment 2

Fourteenth Amendment 2

Statutes

18 United States Code § 2256
Child Pornography Prevention Act of 1996 . . . . . passim

28 United States Code § 1257(a) 1

Tennessee Code Annotated § 39-17-1002 . . . . . 17, 20, 21

Tennessee Code Annotated § 39-17-1003 . . . . . passim

Cases

United States Supreme Court

Ashcroft v. Free Speech Coalition
535 U.S. 234 (2002). . . . . passim

Miller v. California
413 U.S. 15 (1973) . . . . . passim

New York v. Ferber
458 U.S. 747 (1982). . . . . .passim

Tennessee Supreme Court

State v. Pickett and Harwood
211 S.W.3d 696 (Tenn. 2007). . . . . passim

Other State Supreme Courts

Rutti v. State
100 P.3d 394 (Wyo. 2004). 9, 24

State v. Martin
674 N.W.2d (S.D. 2003). 9, 23-24

State v. Cannady
727 N.W.2d 403 (Minn. 2007). 9, 24

Tennessee Court of Criminal Appeals

State v. Butler
No. E2004-00359-CCA-R9-CD, 2005 WL 735080
(Tenn. Crim. App. Mar. 30, 2005). 4, 5, 23

State v. Harwood
No. M2004-01811-CCA-R9-CO, 2005 WL 2205854
(Tenn. Crim. App. Sept. 7, 2005) 5, 20, 23

State v. Pickett
No. M2004-00732-CCA-R3-CD, 2005 WL 2438385
(Tenn. Crim. App. Oct. 3, 2005). 23

Other Authorities

United States Supreme Court Rule 12.4. 1

PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory T. Harwood respectfully petitions, under Supreme Court Rule 12.4, for writ of certiorari to the Tennessee Supreme Court in *State v. Pickett and Harwood*, 211 S.W.3d 696 (Tenn. 2007).

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is published at 211 S.W.3d 696 and is reprinted at App. 1. The opinion of the Tennessee Court of Criminal Appeals is unpublished and appears at App. 32.

STATEMENT OF JURISDICTION

The Tennessee Supreme Court issued its final judgment in this matter on January 22, 2007. This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . .. "

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United states Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Relevant statutory provisions of the Tennessee Code Annotated are reproduced at App. 180-85.

I. STATEMENT OF THE CASE

On April 25, 2003, the Petitioner was indicted and charged with four counts of sexual exploitation of a minor in violation of Tenn. Code Ann. § 39-17-1003 (2003). On May 4, 2004, Petitioner Harwood filed a Motion to Dismiss the Indictment and supporting memorandum challenging the constitutionality of the statute under which he was charged. App. 101. On July 13, 2004 the trial court denied Harwood's motion to dismiss holding that Tenn. Code Ann. § 39-17-1003 was constitutional on its face. App. 69.

On July 19, 2004 the trial court granted Harwood's request for an interlocutory appeal in accordance with Rule 9 of the Tennessee Rules of Appellate Procedure on the bases that (1) Harwood would suffer irreparable harm from any conviction resulting from these charges, (2) an interlocutory finding by a higher court that the statute is unconstitutional would prevent needless, expensive and

protracted litigation, and (3) certain portions of Tenn. Code. Ann. § 39-17-1003 were in need of clarification in light of This Honorable Court's recent holding in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). App. 87.

On August 20, 2004, the Tennessee Court of Criminal Appeals accepted Petitioner's interlocutory appeal. On September 7, 2005, the Court of Criminal Appeals issued its opinion affirming the trial court's holding that Tenn. Code Ann. § 39-17-1003 (2003) is constitutional on its face (App. 32), despite a ruling less than six (6) months before by the Court of Criminal Appeals which held a subsection of this statute to be unconstitutional after *Free Speech*. *See State v. Butler*, unpublished opinion (Tenn. Crim. App. Mar. 30, 2005), App. 136. In addressing this discrepancy, the court stated:

> We note at the outset that we are aware that a panel of this court recently held subsection (b) of the

child exploitation statute unconstitutional and, in turn, elided it. However, upon our research and analysis, we reach a conclusion contrary to that expressed in *Butler* . . . [W]e conclude that [the CPPA and Tenn. Code Ann. § 39-17-1003] can be sharply distinguished. . . . [T]he permissive inference of minority does not expand the scope of the statute to include virtual images and youthful looking actors but merely allows the trier of fact to deem the circumstantial evidence before them sufficient proof that the subject material portrayed an actual minor. This is vastly different from the CPPA, whose scope was far greater and required defendants to almost without fail, work from a deficiency in an attempt to prove that the speech was not unlawful under the far-reaching bounds of the Act.

State v. Harwood (Tenn. Crim. App. Sept. 7, 2005), App. 35, 67. The Tennessee Supreme Court granted review on January 30, 2006, and in a unanimous opinion held that the statute was facially constitutional. The Tennessee Supreme Court opined:

> In our view, the plain language of [Tenn.Code Ann. § 39-17-1003(a) (2003)] requires that the image be of a minor. This language is markedly different from the statute at issue in Free Speech Coalition, which criminalized the possession of any sexually explicit image that "is, or appears to be" of a minor. . . . Moreover, we are not persuaded that the language of subsection (b) expands the coverage of subsection (a) to include constitutionally protected speech . . .. In consequence, it is our view that 39-17-1003(b) (2003), which can best be

described as a permissive inference, is not unconstitutionally overbroad.

Further, it is our view that the statute does not impermissibly shift the burden to the defendant to prove that the image does not depict a minor . . .. A permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the State of the basic fact and places no burden of any kind on the defendant. Conversely, a mandatory presumption violates due process because it shifts the burden to the defendant. It is our view . . . that the statute does not unconstitutionally shift the burden of proof.

State v. Pickett and Harwood, 211 S.W.3d 696, 703, App. 17-20 (internal citations omitted).

II. REASONS FOR GRANTING THE WRIT

While there are differences between the statutory language of the Child Pornography Prevention Act of 1996 ("CPPA") that This Court held to be unconstitutional in *Ashcroft v. Free Speech Coalition* and that of Tennessee's sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, both statutes permit the trier of fact to infer that an image depicted is or appears to be a minor. The effect of the evidentiary inferences allowed under Tennessee's statute is indistinguishable from that in *Free Speech*. In *State v. Pickett and Harwood* (hereinafter *Harwood*), the Supreme Court of Tennessee held that "Tenn. Code Ann. § 39-17-1003(b)(2003), which can best be described as a permissive inference, is not unconstitutionally overbroad." 211 S.W.3d 696, 703 (Tenn. 2007). This statute's "permissive inference," like the unconstitutional language in the CPPA, "leaves unprotected a substantial amount of speech not tied

to the Government's interest in distinguishing images produced using real children from virtual ones." *Free Speech*, 535 U.S. at 255.

The Tennessee Supreme Court misread *Free Speech* as proscribing legislation which includes a mandatory presumption that an image "is, or appears to be" a minor, but which did not involve the exploitation of actual children, i.e., virtual images. This erroneous interpretation represents a fundamental constitutional error. Any modification of *Free Speech* should come from This Court and not the Tennessee Supreme Court.

The decision of the Tennessee Supreme Court, if left unresolved, will foster continued confusion in other states. Indeed, much uncertainty and inconsistency exists among the courts of several states concerning the constitutionality of the various sexual exploitation statutes in light of *Free Speech*. *See State v. Martin*, 674 N.W. 2d (S.D. 2003); *State*

v. Cannady, 727 N.W.2d 403 (Minn. 2007); *and Rutti v. State*, 100 P.3d 394 (Wyo. 2004). Accordingly, This Court should grant the petition for writ of certiorari.

A. The Tennessee Supreme Court's Decision is Irreconcilable with This Court's Decision in *Ashcroft*.

1. Tennessee's Statute Permits an Unconstitutional Inference that a Participant is a Minor

The Tennessee Supreme Court reasoned *Harwood* was distinguishable from *Free Speech*, holding that Tenn. Code Ann. § 39-17-1003(b), which allows a trier of fact to "infer that a participant is a minor," is "markedly different" from the CPPA's criminalization of an image that "is, or appears to be" of a minor. *Harwood*, 211 S.W. 3d at 703, App. 17. Thus, the Tennessee Supreme Court reasoned that only a mandatory presumption that an image depicts a

minor violates due process and unconstitutionally shifts the burden of proof to the defendant. The Tennessee Supreme Court's ruling regarding the appearance of a participant in *Harwood* can be reduced to three points: (1) the Tennessee statute allows an inference that a participant is a minor, (2) the statute places no burden on the defendant to prove that the image is not a minor, and (3) therefore, the statute passes constitutional muster.

The Petitioner asserts that the first point does not inevitably lead to the conclusion that Tennessee's sexual exploitation statute places no burden on the defendant to prove that the participant is not a minor, nor does the statute pass constitutional muster. The trier of fact's inference itself—that the material "depicts a minor"—triggers the due process violation in the Tennessee statute. The fallacy in *Harwood* is that it makes absolutely no difference whether the inference is mandatory or permissive. As soon as the

trier of fact infers that the material depicts a minor, the burden unconstitutionally shifts to the defendant to prove that no actual children were exploited in the production of the materials to avoid conviction. In so doing, Tennessee's sexual exploitation statute unconstitutionally shifts the burden of proof and is overbroad, abridging a substantial amount of lawful speech.

This case is indistinguishable from *Free Speech* which held unconstitutional two provisions of the CPPA. Those provisions defined child pornography as (1) "any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture" that "is *or appears to be*, of a minor engaging in sexually explicit conduct" (18 U.S.C. § 2256(8)(B)), and (2) "any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* it depicts a minor engaging in

sexually explicit conduct" (18 U.S.C. § 2256(8)(D)) (emphasis added). *Free Speech*, 535 U.S. at 241-42. These two provisions were struck down on the basis that they were overbroad and abridged the defendant's right to engage in a substantial amount of protected free speech under the First Amendment. *Id.* at 258.

This Court in *Free Speech* held that the CPPA was inconsistent with the rulings of *Miller v. California*, 413 U.S. 15 (1973) and *New York v. Ferber*, 458 U.S. 747 (1982). The *Miller* standard for determining whether material is obscene requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Free Speech*, 535 U.S. at 246 (citing *Miller*, 413 U.S. at 24). The CPPA prohibited constitutionally protected materials that met the *Miller* test,

because, the CPPA extended to images that need not appeal to the prurient interest nor be patently offensive. *Id.* Any material that explicitly depicted people under the age of eighteen engaged in sexual activity, notwithstanding the manner in which it is presented, was proscribed. *Id.* As a result, the CPPA prohibited speech that has serious redeeming value. *Id* at 248. This Court in *Free Speech* stated:

> Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. . . . Whether or not the films [mentioned in the opinion] violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would

> be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: [t]he artistic merit of a work does not depend on the presence of a single explicit scene.

Id. According to This Court, the CPPA's broad prohibition of any material, regardless of prurient interest, was a clear affront to the constitutional liberties guaranteed by the First Amendment.

This Court further held that the CPPA violated the holding in *Ferber*. 458 U.S. at 747. The *Ferber* Court upheld a prohibition of the sale, distribution, and production of child pornography because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Free Speech*, 535 U.S. at 249 (citing *Ferber*, 458 U.S. at 759). First, the materials were a permanent record of the child's

abuse, and continued circulation would have been harmful to the child who had participated. *Id.* (citing *Ferber*, 458 U.S. at 759). Second, the State had an interest in closing the child pornography distribution network because of the economic motivation for its production. *Id.* (citing *Ferber*, 458 U.S. at 760).

Based on either of these rationales, the *Ferber* Court's holding was limited to banning speech that was a proximate link to the criminal conduct set forth in the statute. *Id.* at 250. *Ferber* banned speech that itself was the record of sexual abuse, whereas the CPPA and Tenn. Code Ann. § 39-17-1003 prohibit speech that records no crime and creates no victims by its production, i.e., "virtual child pornography" or materials that use youthful looking adult actors or models. *Id.* Tennessee's permissive inference that material depicts a minor is indistinguishable from the unconstitutional "is, or appears to be" provision of the

CPPA. The Tennessee Supreme Court holding in *Harwood* must be reversed.

2. Tennessee's Statutory Definition of "Material" is Overbroad

The Tennessee Supreme Court read *Harwood* as distinguishable from *Free Speech*, holding that Tenn. Code Ann. § 39-17-1002(2) "requires proof that the materials depict *actual* minors." *Harwood*, 211 S.W.3d at 704 (emphasis added). The court's ruling regarding the definition of "material" in *Harwood* can be summarized as: (1) the state must convince the trier of fact that the materials depict minors, (2) "actual" minors are depicted, and (3) therefore, the "material" definition for this statute passes constitutional muster.

The Petitioners assert that the trier of fact's ability to infer that material depicts a minor does not inevitably lead to "proof that the materials depict actual minors."

Significantly, at no place in the statute is the term "actual minor" used.[1] The Tennessee Supreme Court's conclusion

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[1] The July 1, 2005 amendment to this statute also never mentions an "actual minor." The statute now provides:

> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
>
> (1) Sexual activity; or
>
> (2) Simulated sexual activity that is patently offensive.
>
> (b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation. Where the number of materials possessed is greater than fifty (50), the person may be charged in a single count to enhance the class of offense under subsection (d).
>
> (c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other

that the statute's definition of "material" is not subject to the *Miller* test, therefore, does not follow. This prohibition, which includes drawings, virtual images, and other materials produced without the exploitation of actual children, does not pass constitutional muster.

Tenn. Code Ann. § 39-17-1003(a) proscribes any material that includes a minor engaged in sexual activity or simulated sexual activity that is patently offensive. "Material" is defined as:

> relevant evidence, in determining whether a person knowingly possessed the material, or in determining whether the material or image otherwise represents or depicts that a participant is a minor.
>
> . . .

Tenn. Code Ann. § 39-17-1003 (2005).

> (A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation; or
>
> (B) Any statue, figure, theatrical production or electrical production; or
>
> (C) Any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval[.]

Tenn. Code Ann. § 39-17-1002(2)(A)-(C) (2003). This overbroad definition, like the CPPA, fails under both the *Miller* and *Ferber* analyses.

The sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, criminalizes materials that are not intrinsically related to the sexual abuse of children. Under its definitions, "material" is exceptionally broad, including "any picture, drawing . . . or other pictorial representation," "any statue,

figure, theatrical production or electrical production" and "any text or image stored on a computer hard drive . . .." *Id.* These images, many created without human models or images of actual minors, reach well beyond the legislative intent of protecting children from harm. Although the statute's purpose is to prohibit the exploitation of actual children, the statute is not narrowly tailored to meet that goal.

As with the CPPA, pursuant to § 39-17-1002(2)(A)-(C), any material, even if it meets the *Miller* standard (i.e., material that does not appeal to prurient interests, is not patently offensive, or has serious literary, artistic, political, or scientific value) is proscribed. The definition of "material" in this statute also goes well beyond the holding in *Ferber*, which prohibits the sale, distribution and production of child pornography because these acts are "intrinsically related" to the sexual abuse of children. *Free*

Speech, 535 U.S. at 250 (*citing Ferber,* 458 U.S. 759). Finally, the CPPA provisions held unconstitutional by *Free Speech* mirrors the Tennessee statute which "prohibits speech that records no crime and creates no victims by its production." *See Free Speech*, 535 U.S. at 250.

The definition of "materials" as applied to Tenn. Code Ann. § 39-17-1003(a) prohibits a substantial amount of protected speech, without satisfying a prurient interest standard as required under *Miller*, in addition to the rationale of both *Ferber* and *Free Speech*. This statute's prohibitions are unconstitutional and deprive the citizens of the State of Tennessee of their constitutional right to engage in a substantial amount of protected speech pursuant to the First Amendment to the United States Constitution.

B. The Tennessee Supreme Court's Decision Directly Conflicts with Other State Supreme Courts' Interpretations of *Ashcroft*.

Review is appropriate here because of the split of authority among states[2] as to whether an inference regarding a minor's age in sexually explicit materials is appropriate after *Free Speech*, and as to the application of the First Amendment to sexually explicit material produced in such a way that no actual minor is depicted, exploited, or harmed.

In *State v. Martin*, 674 N.W.2d 291 (S.D. 2003), South Dakota's Supreme Court held that the state's child

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[2] A similar split in authority exists within the State of Tennessee, where one panel of the Court of Criminal Appeals in *State v. Butler*, App. 136, questioned the constitutionality of Tenn. Code Ann. § 39-17-1003(b) after *Free Speech*, yet another panel of the Court of Criminal Appeals held that the same subsection is constitutional in the instant case, *State v. Harwood*, 2005 WL 2205854 (Tenn. Crim. App.) App. 32, and *State v. Pickett*, 2005 WL 2438385 (Tenn. Crim. App.).

pornography statute, which prohibits "any depiction fixed in any tangible medium of expression of a minor . . . engaging in a prohibited sexual act . . .," is not unconstitutionally vague.

In contrast, the Supreme Court of Minnesota, in *State v. Cannady*, 727 N.W.2d 403 (Minn. 2007), held unconstitutional one subdivision of its pornography statute which provided that the legislative intent was to "penalize possession of pornographic work[s] depicting sexual conduct which involves minors or appears to involve minors . . .."

In a similar case heard in the Supreme Court of Wyoming, *Rutti v. State*, 100 P.3d 394 (Wyo. 2004), that court affirmed the decision of the lower court on different grounds. In Rutti's claim of unconstitutionality, he argued that the state's entire statute was facially overbroad. The court chose to avoid the constitutional question altogether.

Despite minimal differences in the statutory language of the various state statutes, the holding in *Free Speech* left many unanswered questions about what precautions a state must take to protect a defendant's constitutional rights related to the possession of materials and images depicting minors. This Court should resolve the issue here in *Harwood*, which can serve as a precedent in other jurisdictions, as well as in the State of Tennessee.

III. CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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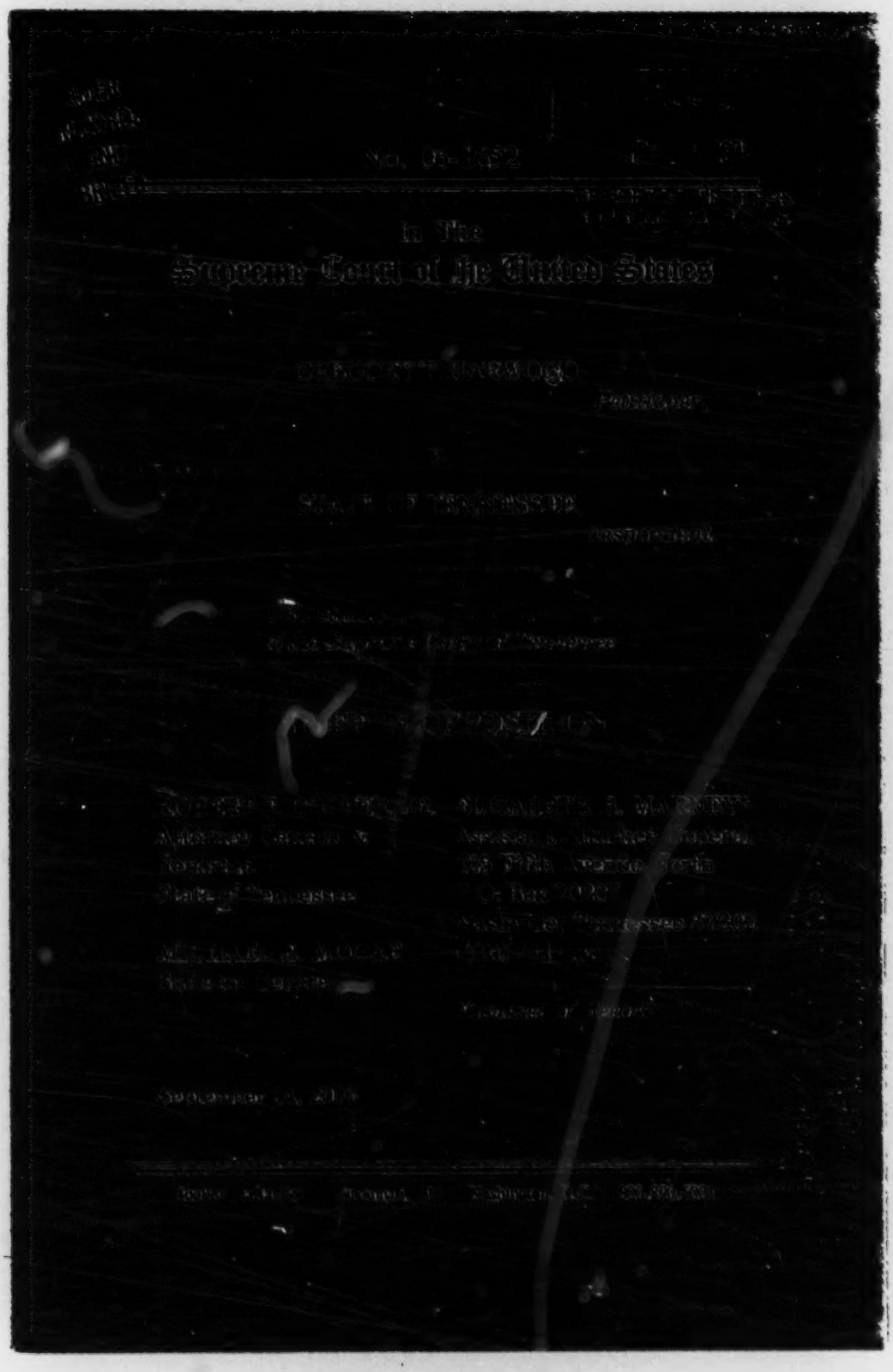

In The
Supreme Court of the United States

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QUESTION PRESENTED

Whether the decision by the Tennessee Supreme Court, concluding that the Tennessee statute criminalizing sexual exploitation of a minor was constitutional, is consistent with this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 3,5

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.,
389 U.S. 327 (1967) 2

County Court of Ulster County v. Allen,
442 U.S. 140 (1979) 6

Estelle v. McGuire,
502 U.S. 62 (1991) 9

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,
240 U.S. 251 (1916) 2

Miller v. California,
413 U.S. 15 (1973) 5,9,10

New York v. Ferber,
458 U.S. 747 (1982) 5,10

Reece v. Georgia,
350 U.S. 85 (1955) 3

Rutti v. State,
100 P.3d 394 (Wyo. 2004) 6,7,8

State v. Cannady,
727 N.W.2d 403 (Minn. 2007) 7,8

State v. Harwood,
M2004-01811-CCA-R9-CO, 2005 WL 2205854
(Tenn. Crim. App. Sept. 7, 2005) 1

State v. Martin,
674 N.W.2d 291 (S.D. 2003) 6,7,8

State v. Pickett,
211 S.W.3d 696 (Tenn. 2007) 1,2

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 2

Washington v. Washington State Commercial Passenger Fishing Vessel Association,
443 U.S. 658 (1979) 3

STATUTES

18 U.S.C. § 2256(8)(B) (1996) 5

28 U.S.C. § 1257(b) 1

2005 Tenn. Pub. Acts, ch. 496, §2 4

Tenn. Code Ann. § 39-17-1002(2) (2003) 9

Tenn. Code Ann. § 39-17-1003 (2003)
(amended 2005) ..... *passim*

OTHER AUTHORITY

Robert L. Stern, et al.,
Supreme Court Practice § 4.18 (8th ed. 2002) 2

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is published at 211 S.W.3d 696. The opinion of the intermediate Court of Criminal Appeals is unpublished but available at 2005 WL 2205854.

STATEMENT OF JURISDICTION

The decision of the Tennessee Supreme Court issued on January 22, 2007. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(b).

STATEMENT OF THE CASE

After the Davidson County Grand Jury charged Harwood with four counts of knowingly possessing material that included a minor engaged in sexual activity in violation of Tenn. Code Ann. §39-17-1003 (2003) (amended 2005), he filed a motion to dismiss the indictment on the ground that the statute was unconstitutional on its face. The trial court denied Harwood's motion, holding that Tenn. Code Ann. § 39-17-1003 was facially constitutional. The trial court and the Tennessee Court of Criminal Appeals granted Harwood's application for permission to pursue an interlocutory appeal under Rule 9, Tenn. R. App. P.

The Court of Criminal Appeals affirmed the trial court's denial of Harwood's motion to dismiss, finding the statute constitutional. *State v. Harwood*, M2004-01811-CCA-R9-CO, 2005 WL 2205854 (Tenn. Crim. App. Sept. 7, 2005). The Tennessee Supreme Court affirmed the judgment of the Court of Criminal

Appeals. *State v. Pickett*, 211 S.W.3d 696 (Tenn. 2007).

REASONS FOR DENYING THE WRIT

The decision of the Tennessee Supreme Court is interlocutory, is correct, does not conflict with any decision of this Court, and is distinguishable from the decisions of other state supreme courts relied on by the petitioner. Furthermore, the statute alleged to be unconstitutional has been amended by the Tennessee General Assembly to remove the allegedly unconstitutional provision. Review by this Court is unwarranted.

1. The decision of the Tennessee Supreme Court is interlocutory, simply affirming the trial court's refusal to dismiss the indictment based on the petitioner's assertion that Tenn. Code Ann. § 39-17-1003 (2003) was unconstitutional. This Court "generally await[s] final judgment in the lower courts before . . . exercising certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). The interlocutory nature of the order "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some . . . unusual factor, the interlocutory

nature of a lower court judgment will generally result in a denial of certiorari.").

Nor does this case present any reason to depart from the general rule against review of interlocutory orders. To the contrary, this case is particularly ill-suited for review now. Further proceedings in the trial court may clarify or even eliminate the issues raised by the petitioner. For example, the present record does not reflect the nature of the State's proof that the person portrayed in the photographs is a minor. It may well be that the State will be able to prove minority without reliance on the allegedly unconstitutional inference. Moreover, if the petitioner is acquitted, the issues will be moot. On the other hand, if he is convicted and the judgment again affirmed in the state appellate courts, the petitioner would be free to seek review of that final judgment by this Court by way of a petition for a writ of certiorari. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Reece v. Georgia*, 350 U.S. 85, 87 (1955).

2. In any event, the decision of the Tennessee Supreme Court upholding the constitutionality of the permissive inference is correct. The decision does not conflict with this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), because the Tennessee statute does not contain the provision found unconstitutionally overbroad in *Free Speech Coalition*. Nor does the decision conflict with the other state supreme court decisions relied on by the petitioner. Furthermore, the statute does not impermissibly shift the burden to a defendant to prove that the image does not depict a minor.

a. At the time the offenses alleged in the indictment were committed, Tenn. Code Ann. § 39-17-1003 provided as follows:

> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
>
> (1) Sexual activity; or
> (2) Simulated sexual activity that is patently offensive.
> (b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.
> (c) A violation of this section is a Class E felony.[1]

---

[1] The statute was amended in 2005, *see* 2005 Tenn. Pub. Acts, ch. 496, §2, and now provides as follows:

> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
>
> (1) Sexual activity; or
> (2) Simulated sexual activity that is patently offensive.
>
> (b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, video cassette tape, or other pictorial representation. Where the number of materials possessed in greater than

In *Free Speech Coalition*, this Court held that the provisions of the Child Pornography Prevention Act of 1996, which prohibited any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct," 18 U.S.C. § 2256(8)(B) (1996), was unconstitutional. 535 U.S. at 258. Relying on *Miller v. California*, 413 U.S. 15, 24 (1973), and *New York v. Ferber*, 458 U.S. 747, 764 (1982), the Court concluded that the federal statutory provision was overbroad because it criminalized even those images that were not obscene and that did not involve the exploitation of actual children, such as computer-generated images or the use of adults that appear to be minors. 535 U.S. at 250-56. However, the Tennessee statute at issue in this case is materially different. The plain language of § 39-17-1003(a) requires that the image be of "a

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fifty (50), the person may be charged in a single count to enhance the class of the offense under subsection (d).

(c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence, in determining whether a person knowingly possessed the material, or in determining whether the material or image otherwise represents or depicts that participant is a minor.

Tenn. Code Ann. § 39-17-1003 (2006). Thus, the amendment removed the permissive inference petitioner challenges. Review of a superseded statutory provision would have little or no precedential value, and thus any determination of the question by this Court would have such limited impact that it is not worthy of the Court's attention.

minor." It does not prohibit a visual depiction of one who "appears to be" a minor.

Moreover, the permissive inference contained in § 39-17-1003(b) is just that— an evidentiary device that permits, but does not require, the factfinder to infer a fact circumstantially from the evidence presented that the person depicted is a minor. It does not alter the requirement that the State prove that the person depicted is "a minor." As this Court has observed, "[i]nferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts." *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979) (citations omitted). The inference in subsection (b) simply lists circumstantial evidence that may properly be considered by the factfinder in determining whether the actor is a minor. Unlike a prosecution under the statute in *Free Speech Coalition*, the State may not prove the offense by showing that the actor "appears to be" a minor beyond a reasonable doubt; rather, the prosecution must prove that the actor *is* "a minor" beyond a reasonable doubt.

b. Petitioner asserts that the decisions of three other state supreme courts directly conflict with the Tennessee Supreme Court decision, citing *State v. Martin*, 674 N.W.2d 291 (S.D. 2003), *State v. Cannady*, 727 N.W.2d 403 (Minn. 2007), and *Rutti v. State*, 100 P.3d 394 (Wyo. 2004). However, contrary to petitioner's assertion, none of those cases is contrary to the decision in this case.

Indeed, in *Martin* the South Dakota statute prohibited "any depiction . . . of a minor under the age of eighteen years engaging in a prohibited sexual act. . . ." 674 N.W.2d at 299 (quoting S.D. Codified Laws § 22-22-23.1 (repealed)). The South Dakota Supreme Court concluded that the provision was not overbroad under *Free Speech Coalition* because, "[o]n its face, . . . [the statute] only applies to child pornography involving actual children." 674 N.W.2d at 300. Thus, the statute as construed by the South Dakota Supreme Court, like § 39-17-1003, does not criminalize material that only appears to depict a child.

And, in both *Cannady* and *Rutti*, the statutes contain the same defect as the federal statute in *Free Speech Coalition*. For example, the statute in *Cannady* prohibited possession of material that "*conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexual conduct." 727 N.W.2d at 407 (quoting Minn. Stat. § 617.246, subd. 1(f)(2)(iii) (2006)) (emphasis in original). Similarly, the Wyoming statute in *Rutti* prohibited, *inter alia*, a visual depiction that "appears to be" of a child engaging in explicit sexual conduct or that "conveys the impression" that the material contains a depiction of a child engaging in explicit sexual conduct. 100 P.3d at 399 (quoting Wyo. Stat. Ann. § 6-4-303(a)(ii)(B), (D)). Thus, neither statute is analogous to § 39-17-1003.

Moreover, neither decision actually addressed a specific overbreadth challenge to the offending provisions. In *Cannady*, the court observed that the trial court had held subdivision 1(f)(2)(iii) unconstitutional under *Free Speech Coalition*, and,

because, Cannady did not raise the constitutionality of that subdivision on the appeal, the court expressed no opinion regarding the issue. 727 N.W.2d at 407 n.2. In *Rutti*, the court rejected Rutti's facial overbreadth challenge to the entire statute because it also prohibited the use of an actual child in pornographic material and, therefore, could be constitutionally applied if unconstitutional portions were severed. 100 P.3d at 404. But, because Rutti had not presented an argument as to § 6-4-303(a)(ii)(B) and (D), the court refused to consider any challenge to those specific provisions on the appeal.[2] 100 P.3d at 404. Therefore, petitioner's argument that *Martin*, *Cannady*, and *Rutti* conflict with the Tennessee Supreme Court's decision lacks any merit.

c. Petitioner contends that the inference in § 39-17-1003(b) impermissibly shifts the burden of proof to a defendant to prove that the image does not depict a minor. But, as the Tennessee Supreme Court correctly determined, that is not the case. The statute plainly provides that "the trier of fact *may infer* that a participant is a minor" from various sources. (Emphasis added). Such a permissive inference, which allows but does not require the trier of fact to infer the elemental fact from proof by the State of the basic fact,

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[2] Nevertheless, the court observed that the State had conceded that the pertinent definitional language of the statute was very similar to the corresponding language of the federal statute found unconstitutional in *Free Speech Coalition* and that, "[a]lthough unconstitutional provisions of a statute are judicially severable if it were to become necessary, it is preferable if § 6-4-303 receives the urgent attention of the Wyoming Legislature." 100 P.3d at 404.

places no burden of any kind upon the defendant. *See Estelle v. McGuire*, 502 U.S. 62, 79 (1991) ("a permissive inference is not a violation of due process because the State still has the burden of persuading the jury that the suggested conclusion should be inferred based on the predicate facts proved."). The statutory inference does not compel the trier of fact to conclude that the material depicts a minor. It places no burden on the defendant. The State must still establish each of the elements of the crime, including the fact that the material contains the image of a minor.

3. Finally, petitioner assails the decision of the Tennessee Supreme Court upholding the constitutionality of the statute's definition of "material," which is

> (A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation;
> (B) Any statute, figure, theatrical production or electrical reproduction; or
> (C) Any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval; . . . .

Tenn. Code Ann. § 39-17-1002(2) (2003). He contends that the definition fails to meet the requirements of *Miller* because it does not mandate that the material be obscene. Petitioner's argument fails because it relies on a faulty premise—that the statute applies to persons other than actual minors.

This Court held in *Ferber* that pornography using actual children is not constitutionally protected speech; therefore, the *Miller* test does not apply to such material. 458 U.S. at 756. In order to constitute a criminal act under § 39-17-1003, the offending "material" must include a minor engaged in sexual activity. Because the Tennessee statute applies only to material depicting actual minors, the *Miller* test is simply beside the point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

No. ____

IN THE
Supreme Court of the United States

GREGORY T. HARWOOD,

Petitioner

V.

STATE OF TENNESSEE

On Petition For Writ Of Certiorari
To The Supreme Court Of Tennessee

APPENDIX

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TABLE OF CONTENTS

Page No.

State of Tennessee v. Kelly Michael PICKETT and
State of Tennessee v. Gregory T. HARWOOD
Opinion of Tennessee Supreme Court
Nos. M2004-00732-SC-R11-CD, M2004-01811-SC-R11-CO.
Jan. 22, 2007 .....App. 1

ORDER OF THE TENNESSEE COURT OF CRIMINAL APPEALS
State of Tennessee v. Gregory T. HARWOOD.
No. M2004-01811-CCA-R9-CO.
Application for Permission to Appeal Granted by Supreme Court
Jan. 30, 2006 .....App. 32

ORDER OF THE DAVIDSON COUNTY CRIMINAL COURT DENYING MOTION TO DISMISS INDICTMENT
State of Tennessee v. Gregory T. HARWOOD.
No. 2003-B-843.
Granted July 13, 2004.....App. 69

ORDER OF THE DAVIDSON COUNTY CRIMINAL COURT GRANTING INTERLOCUTORY APPEAL
State of Tennessee v. Gregory T. HARWOOD.
No. 2003-B-843.
Granted July 19, 2004 .....App. 87

ORDER OF THE DAVIDSON COUNTY CRIMINAL COURT GRANTING MOTION FOR PERMISSION TO APPEAL AND APPLICATION FOR A STAY
State of Tennessee v. Gregory T. HARWOOD.
No. 2003-B-843.
Granted July 14, 2004 .....App. 94

HARWOOD MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW
State of Tennessee v. Gregory T. HARWOOD.
No. E2004-00359-CCA-R9-CD.
Filed May 14, 2004 . .....App. 101

ORDER OF THE TENNESSEE COURT OF CRIMINAL APPEALS
State of Tennessee v. Richard Allen BUTLER and Re'Licka Dajuan Allen
No. M2004-01811-CCA-R9-CO.
Application for Permission to Appeal Granted by Supreme Court
Aug. 22, 2005.....App. 136

RELEVANT TENNESSEE STATUTES

TENNESSEE CODE ANNOTATED

§ 39-17-1002 ..... App. 180

§ 39-17-1003 ..... App. 183

Supreme Court of Tennessee,
at Nashville.

STATE of Tennessee
v.
Kelly Michael Pickett.
and
State of Tennessee
v.
Gregory T. Harwood.
Nos. M2004-00732-SC-R11-CD, M2004-01811-SC-R11-CO.
Oct. 4, 2006 Session.
Jan. 22, 2007.

We granted the appeal in each of these cases to determine the constitutionality of Tennessee Code Annotated section 39-17-1003 (2003), which prohibits the possession of child pornography. Initially, the statute is neither unconstitutionally vague nor overbroad. Secondly, we hold that because the charges against Pickett were multiplicitous, only one conviction is permissible under the circumstances

of that case. In consequence, the judgment of the Court of Criminal Appeals in each case is affirmed.

Tenn. R. App. P. 11 Appeal by Permission; Judgments of the Court of Criminal Appeals Affirmed

GARY R. WADE, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., JANICE M. HOLDER, and CORNELIA A. CLARK, JJ., and ADOLPHO A. BIRCH, JR., SP. J., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, Kelly Michael Pickett.

Jodie A. Bell and Wendy S. Tucker, Nashville, Tennessee, for the appellant, Gregory T. Harwood.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bernard McEvoy and Brian K. Holmgren, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

State v. Pickett

When police discovered images of nude children on his personal computer, Kelly Michael Pickett was indicted on eleven counts of sexual exploitation of a minor in violation of Tennessee Code Annotated section 39-17-1003 (2003). Prior to trial, Pickett filed a motion to dismiss the entire indictment, alleging that Tennessee Code Annotated section 39-17-1003 was unconstitutional on its face. In the alternative, he sought dismissal of ten of the counts on grounds of multiplicity. The trial court ruled that the charges in the indictment were not multiplicitous. As to Pickett's constitutional challenge, the trial court concluded that resolution of the issue was not "capable of determination without a trial of the general issue." The case proceeded to trial without a

jury some eleven months later.

The testimony established that in October of 1999, Pickett moved his personal computer to the residence of a

friend, Allen Birney, who had Internet access. Thereafter, Pickett visited the Birney residence regularly in order to use the computer. On one occasion, Birney observed an "unusual" image on the screen while Pickett was using the computer. He later accessed some files on the computer and discovered images depicting nude children, one of which was a representation of two young boys engaged in oral sex. When Birney confronted Pickett, demanding that he either delete the images or remove the computer from the residence, Pickett claimed that the images had been e-mailed to him by a friend.

After being alerted that Pickett possessed child pornography, Detectives Robert Carrigan and Grant Carroll of the Metropolitan Nashville Police Department asked for and received permission from Pickett to search the computer. They discovered numerous images of nude children stored in the computer's temporary Internet file.

Detective Carroll testified that he found images of both prepubescent and teenage girls in provocative poses. Detective Carroll explained that when a user visits a website that contains images, the images are automatically stored in the temporary Internet file.

A more thorough search of Pickett's computer revealed even more stored images. Detective Stanley Mitchell of the Computer Forensics Laboratory of the police department testified that in addition to those images contained in the temporary Internet file, there were more than one hundred images in the computer's unallocated space. Detective Mitchell explained that the images could have been placed in the computer's unallocated space when Pickett visited child pornography websites or when he downloaded and then deleted images from either the Internet, a diskette, or an e-mail. The officer explained that

there was no way to conclusively determine how the images had been stored in the unallocated space.

Following the trial, the trial court upheld the constitutionality of Tennessee Code Annotated section 39-17-1003 and found Pickett guilty of eleven counts of sexual exploitation of a minor based upon eleven of the images recovered from his computer. On appeal, the Court of Criminal Appeals held that the statute was not unconstitutional but dismissed ten of the eleven convictions, concluding that the charges were multiplicitous.

State v. Harwood

Because the appeal by Harwood is interlocutory, few facts were developed in the trial court. He was indicted for four counts of sexual exploitation of a minor in violation of Tennessee Code Annotated section 39-17-1003 (2003). Following the indictment, Harwood filed a motion to dismiss, challenging the constitutionality of Tennessee

Code Annotated section 39-17-1003. The trial court rejected the claim, ruling that the statute was constitutional, but granted the request for this interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals affirmed the ruling of the trial court.

II. Analysis

A. *Constitutionality of Tennessee Code Annotated section 39-17-1003 (2003)*

Both Pickett and Harwood assert that Tennessee Code Annotated section 39- 17-1003 (2003) is unconstitutional on its face. Relying on the United States Supreme Court decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), each defendant contends that the statute is unconstitutionally vague and overbroad.

Initially, our courts are charged with upholding the constitutionality of statutes where possible. Dykes v. Hamilton County, 183 Tenn. 71, 191 S.W.2d 155, 159 (1945); State v. Joyner, 759 S.W.2d 422, 425 (Tenn.Crim.App.1987). "In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." Gallaher v. Elam, 104 S.W.3d 455, 459 (Tenn.2003) (citing State v. Robinson, 29 S.W.3d 476, 479-80 (Tenn.2000); Riggs v. Burson, 941 S.W.2d 44, 51 (Tenn.1997)). Moreover, this Court is required to "'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.' " Id. (quoting State v. Taylor, 70 S.W.3d 717, 721 (Tenn.2002)).

This Court's role when construing a statute is "'to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" Houghton v. Aramark Educ. Res., Inc.,

90 S.W.3d 676, 678 (Tenn.2002) (quoting Owens v. State, 908 S.W.2d 923, 926 (Tenn.1995)). "Legislative intent is determined 'from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.' " Osborn v. Marr, 127 S.W.3d 737, 740 (Tenn.2004) (quoting State v. Flemming, 19 S.W.3d 195, 197 (Tenn.2000)). "When the statutory language is clear and unambiguous, we apply the plain language in its normal and accepted use." Boarman v. Jaynes, 109 S.W.3d 286, 291 (Tenn.2003) (citing State v. Nelson, 23 S.W.3d 270, 271 (Tenn.2000)).

At the time of the offenses in these cases, Tennessee Code Annotated section 39-17-1003 provided as follows:

> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
>
> (1) Sexual activity; or

(2) Simulated sexual activity that is patently offensive.

(b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.

(c) A violation of this section is a Class E felony.

Tenn. Code Ann. § 39-17-1003 (2003) (emphasis added).[1]

---

[1] This version of the statute became law in 1990. The statute was amended in 2005 and now provides as follows:

(a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:

(1) Sexual activity; or

(2) Simulated sexual activity that is patently offensive.

(b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film, videocassette tape, or other pictorial representation. Where the number of materials possessed is greater than

In Ashcroft v. Free Speech Coalition, the United States Supreme Court ruled that the provision of the Child Pornography Prevention Act of 1996 that prohibited any visual depiction that "is, or appears to be, of a minor engaging in sexually explicit conduct" was unconstitutional.

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fifty (50), the person may be charged in a single count to enhance the class of offense under subsection (d).

(c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence, in determining whether a person knowingly possessed the material, or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

(d) A violation of this section is a Class D felony; however, if the number of individual images, materials, or combination of images and materials, that are possessed is more than fifty (50), then the offense shall be a Class C felony. If the number of individual images, materials, or combination of images and materials, exceeds one hundred (100), the offense shall be a Class B felony.

(e) In a prosecution under this section, the state is not required to prove the actual identity or age of the minor.

Tenn. Code Ann. § 39-17-1003 (2006).

See Free Speech Coalition, 535 U.S. at 258, 122 S.Ct. 1389; see also 18 U.S.C. § 2256(8)(B) (1996).[2] Citing its earlier decisions in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (defining obscenity, which is not constitutionally protected speech, as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value"), and New York v. Ferber, 458 U.S. 747, 764, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (concluding that pornography which is created by using actual children is not constitutionally protected speech), the Court concluded that the statutory provision at issue was overbroad because it criminalized even those images that were not obscene and that did not involve the

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[2] Congress amended the Child Pornography Protection Act in 2003 to remove the offending language. See 18 U.S.C. § 2256 (2003).

exploitation of actual children, such as computer-generated images or the use of adults that appear to be minors. Id. at 250-56.

Both Pickett and Harwood assert that Tennessee Code Annotated section 39- 17-1003(b), which provides that "the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor," abridges free speech because it encompasses images where no child exploitation was actually involved, such as computer-simulated or virtual images. The defendants also contend that subsection (b) impermissibly shifts the burden to the defendant to prove that the images do not portray actual minors. The State submits that subsection (b) does not prohibit constitutionally protected speech and that the inference contained in that section operates merely as an evidentiary device.

In each case, the Court of Criminal Appeals concluded that the statute is not overbroad. The intermediate court ruled that subsection (b) does not expand subsection (a) to include images that do not depict actual minors. The court also held that subsection (b) operates as an evidentiary device. In an unrelated case, however, a separate panel of the Court of Criminal Appeals questioned the constitutionality of the statute. In the consolidated cases of State v. Butler; State v. Allen, No. E2004-00359-CCA-R9-CD, 2005 WL 735080, 2005 Tenn.Crim.App. LEXIS 302 (Tenn.Crim.App. Mar. 30, 2005), the intermediate court held that subsection (b) is unconstitutional because it "comes too close to permitting a conviction based on the possession of material in which an actual minor is not involved, in violation of the holding in Free Speech Coalition." Id. at *17.

The constitutional test for overbreadth is whether the statute's language overreaches unlawful conduct and encompasses activity that is constitutionally protected. State v. Forbes, 918 S.W.2d 431, 448 (Tenn.Crim.App.1995); see Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The United States Supreme Court has made the following observations regarding the doctrine of overbreadth:

> Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." We have, in consequence, insisted that the overbreadth involved be "substantial"

> before the statute involved will be invalidated on its face.

Ferber, 458 U.S. at 769, 102 S.Ct. 3348 (citation and footnote omitted).

Under our principles of due process, an overbroad or vague statute is vulnerable to a constitutional challenge because it (1) fails to provide fair notice that certain activities are unlawful; and (2) fails to establish reasonably clear guidelines for law enforcement officials and courts, which, in turn, invites arbitrary and discriminatory enforcement. Forbes, 918 S.W.2d at 448 (citing Rose v. Locke, 423 U.S. 48, 49-50, 96 S. Ct. 243, 46 L.Ed.2d 185 (1975); Smith v. Goguen, 415 U.S. 566, 572-73, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974)).

In our view, the plain language of subsection (a) of Tennessee Code Annotated section 39-17-1003 requires that the image be of "a minor." Tenn. Code Ann. § 39-17-

1003(a) (2003). This language is markedly different from the statute at issue in Free Speech Coalition, which criminalized the possession of any sexually explicit image that "is, or appears to be" of a minor. See Free Speech Coal., 535 U.S. at 241-56, 122 S. Ct. 1389 (emphasis added). In that case, the "appears to be" language rendered the statute unconstitutionally overbroad. Id. The Tennessee statute does not contain this language. Moreover, we are not persuaded that the language of subsection (b) expands the coverage of subsection (a) to include constitutionally protected speech. Subsection (b), which permits the trier of fact to infer that the image is of a minor, does not alter the requirement that the image be of "a minor." In consequence, it is our view that Tennessee Code Annotated section 39-17-1003(b) (2003), which can best be described as a permissive inference, is not unconstitutionally overbroad.

Further, it is our view that the statute does not impermissibly shift the burden to the defendant to prove that the image does not depict a minor. Both this Court and the United States Supreme Court have specifically approved of the use of permissive inferences in criminal trials. See, e.g., Estelle v. McGuire, 502 U.S. 62, 78-79, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991); Lowe v. State, 805 S.W.2d 368, 371-72 (1991); State v. Bolin, 678 S.W.2d 40, 42 (Tenn.1984). In Estelle, the United States Supreme Court held that "a permissive inference is not a violation of due process because the State still has the burden of persuading the jury that the suggested conclusion should be inferred based on the predicate facts proved." Estelle, 502 U.S. at 79, 112 S. Ct. 475 (citing Ulster County Court v. Allen, 442 U.S. 140, 157-63, 99 S. Ct. 2213, 60 L.Ed.2d 777 (1979)). A "permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the

State of the basic fact and places no burden of any kind on the defendant." Bolin, 678 S.W.2d at 42.

Conversely, a mandatory presumption violates due process because it shifts the burden to the defendant. Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977). "The mandatory presumption tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless [the] defendant comes forward with some evidence to rebut the presumed connection between the two facts." Bolin, 678 S.W.2d at 42.

In this instance, Tennessee Code Annotated section 39-17-1003(b) provides that "the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor." Tenn. Code Ann. § 39-17- 1003(b) (2003) (emphasis added). The statute does not require the trier of fact to conclude that the material depicts a minor.

Further, the statute places no burden on the defendant to prove that the image is not that of a minor. The State must still establish each of the elements of the crime, including the fact that the material contains the image of a minor. It is our view, therefore, that the statute does not unconstitutionally shift the burden of proof.

The defendant Harwood also asserts that the definition of the term "material," as it appears in the statute, is unconstitutionally overbroad. Tennessee Code Annotated section 39-17-1002(2) (2003) defines "material" as follows:

(A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation;

(B) Any statue, figure, theatrical production or electrical reproduction; or

(C) Any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval;....

Tenn. Code Ann. § 39-17-1002(2)(A)-(C) (2003). Harwood contends that this language is overbroad because there is no requirement that the material be obscene as defined in Miller. See Miller, 413 U.S. at 24, 93 S. Ct. 2607. This argument, however, overlooks the fact that in order to constitute a criminal act under section 39-17-1003, possession of any of the above must include a minor engaged in sexual activity. See Tenn. Code Ann. § 39-17-1003(a) (2003). The United States Supreme Court held in Ferber that the Miller test does not apply to child pornography, which is not constitutionally protected speech. See Ferber, 458 U.S. at 756, 102 S. Ct. 3348. Tennessee Code Annotated section 39-17-1003 does not criminalize the possession of materials that do not contain actual

minors. Because our statute requires proof that the materials depict actual minors, it is not subject to the Miller test.

Finally, the defendants assert that the statute is unconstitutionally vague because it does not define the word "possess." While maintaining that the term "possess" provides too much discretion in the application of the law, Pickett and Harwood argue that the statute would permit the prosecution of otherwise innocent individuals who, by mere chance, happen upon child pornography.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned, 408 U.S. at 108, 92 S. Ct. 2294. "A criminal statute that forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Leech v. Am. Booksellers Ass'n, 582 S.W.2d 738, 746 (Tenn.1979)

(citing U.S. Const. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law;...."); Tenn. Const. art. I, § 8 ("[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.")). The fair warning requirement embodied in the due process clause prohibits the states from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954) (footnote omitted). Due process requires that the law give sufficient warning so that people may avoid conduct which is forbidden. Rose, 423 U.S. at 50, 96 S. Ct. 243. "Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'"

Id. at 49-50, 96 S. Ct. 243 (quoting Robinson v. United States, 324 U.S. 282, 286, 65 S. Ct. 666, 89 L. Ed. 944 (1945)). The constitutional test for vagueness is whether a statute's "prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed." Forbes, 918 S.W.2d at 447-48 (citing Grayned, 408 U.S. at 108, 92 S. Ct. 2294; Baggett v. Bullitt, 377 U.S. 360, 367, 84 S. Ct. 1316, 12 L.Ed.2d 377 (1964)).

This Court must employ the natural and ordinary meaning of the words in the statute to give effect to the legislative intent. Here, the statute makes it a crime to "possess material that includes a minor engaged in ... [s]exual activity; or ... [s]imulated sexual activity that is patently offensive." Tenn. Code Ann. § 39-17-1003(a) (2003). Black's Law Dictionary defines the term "possess" as "[t]o have in one's actual control; to have possession of." Black's Law Dictionary 1201 (8th ed. 2004). "Possession" is

defined as "[t]he fact of having or holding property in one's power; the exercise of dominion over property." Id. Moreover, as the Court of Criminal Appeals observed, the term "possess" is modified by the term "knowingly." "'Knowing' means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." Tenn. Code Ann. § 39-11-106(20) (2006). Because the possession contemplated by the statute must be "knowing," a person who inadvertently stumbles upon child pornography would not be guilty of a crime under the terms of the statute. Because the prohibited conduct is clearly defined, the act is not unconstitutionally vague. See Forbes, 918 S.W.2d at 447-48.

II. Multiplicity

The State contends in this appeal that the Court of Criminal Appeals erred by ruling that ten of Pickett's eleven

convictions for sexual exploitation of a minor were multiplicitous. We disagree.

The double jeopardy clause of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, article 1, section 10 of the Tennessee Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. 1, § 10. This Court has observed that "three fundamental principles underlie double jeopardy: (1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for the same offense." State v. Denton, 938 S.W.2d 373, 378 (Tenn.1996) (citations and footnote omitted). In Denton, we observed that "whether two offenses are the 'same' for double jeopardy purposes depends upon a 'close and careful analysis of the

offenses involved, the statutory definitions of the crimes, the legislative intent and the particular facts and circumstances.' " Id. at 379 (quoting State v. Black, 524 S.W.2d 913, 919 (Tenn.1975)). Finally, this Court noted that while appellate review must be guided by the test announced in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), that test is not conclusive of legislative intent and the reviewing court must also examine (1) whether there were multiple victims involved; (2) whether several discrete acts were involved; and (3) whether the evil at which each offense is directed is the same or different. Denton, 938 S.W.2d at 380-81.

In State v. Phillips, this Court explained the doctrine of multiplicity:

> Multiplicity concerns the division of conduct into discrete offenses, creating several offenses out of a single offense. Several general principles determine

whether offenses are "stacked" so as to be multiplicitous:

1. A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution;

2. If each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and

3. Where time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act.

State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996) (footnotes omitted). "Additional factors such as the nature of the act; the time elapsed between the alleged conduct; the

intent of the accused, i.e., was a new intent formed; and cumulative punishment may be considered for guidance in determining whether the multiple convictions violate double jeopardy." State v. Epps, 989 S.W.2d 742, 745 (Tenn. Crim. App. 1998) (citing Phillips, 924 S.W.2d at 665).

In this case, the Court of Criminal Appeals concluded that ten of the eleven counts against Pickett were multiplicitous. That court reasoned that because "the State presented no evidence concerning which pictures came from which website or when [Pickett] accessed each picture," the evidence established only one crime.

The proof at Pickett's trial established that numerous images were stored in either the temporary Internet file or the unallocated space of Pickett's personal computer. Detective Mitchell testified that he was unable to determine when the defendant had accessed the images or from which websites the images had come. Based upon that testimony,

the Court of Criminal Appeals concluded that "all of the pictures could have come from a single website and could have been automatically downloaded onto the appellant's hard drive simultaneously." The State did not otherwise attempt to distinguish the offenses by showing that the crimes were separated by time or location or by otherwise demonstrating that Pickett formed a new intent as to each image. See Epps, 989 S.W.2d at 745. Further, the State has not established that our legislature intended cumulative punishment. By the application of controlling precedent, it is our view that the evidence established only one offense and that the charges against Pickett were, therefore, multiplicitous.

Conclusion

We hold that Tennessee Code Annotated section 39-17-1003 (2003) is not vague or overbroad in violation of the state or federal constitutions. We also hold that the charges

against the defendant Pickett were multiplicitous and that the evidence supports only one conviction. Thus, we affirm the judgments of the Court of Criminal Appeals in each case.

It appearing that the defendant, Kelly Michael Pickett, is indigent, the costs of the appeal in his case are taxed to the State of Tennessee. In the defendant Harwood's appeal, the costs of the appeal are taxed to the defendant, Gregory T. Harwood and his surety, for which execution may issue if necessary. _____/s/_____

GARY R. WADE, JUSTICE

Court of Criminal Appeals of Tennessee,
at Nashville.
STATE of Tennessee
v.
Gregory T. HARWOOD.
No. M2004-01811-CCA-R9-CO.
March 8, 2005 Session.
Sept. 7, 2005.
Application for Permission to Appeal
Granted by Supreme Court
Jan. 30, 2006.

Interlocutory Appeal from the Criminal Court for Davidson County, No.2003-B-843; Steve Dozier, Judge.

This interlocutory appeal presents a challenge to the constitutionality of Tennessee's child exploitation statute. Upon thorough review, we conclude that: (1) the term "knowingly possess" provides fair warning of the conduct prohibited by the statute and does not allow for the prosecution of individuals who innocently possess child pornography; (2) the term "material," as used in the statute, does not encompass protected speech such as virtual

pornography or images that only "appear" to depict minors; and (3) the permissive inference contained in subsection (b) of the subject statute neither broadens the scope of the statute nor shifts the burden of proof but, rather, allows the jury to deem circumstantial evidence sufficient to meet the State's burden of proof beyond a reasonable doubt. For these reasons, we hold that Tennessee Code Annotated section 39-17-1003 is constitutional on its face and affirm the trial court's denial of the motion to dismiss.

Tenn. R. App. P. 9; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and NORMA McGEE OGLE, JJ., joined.

Jodie A. Bell and Wendy S. Tucker, Nashville, Tennessee, for the appellant, Gregory T. Harwood.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. (Torry)

Johnson, III, District Attorney General; and Brian K. Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The defendant, Gregory T. Harwood, was charged with four counts of sexual exploitation of a minor (a Class E felony). Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, he was granted application for interlocutory appeal to challenge the trial court's denial of his motion to dismiss, in which he asserted that Tennessee Code Annotated section 39-17-1003 is unconstitutional on its face. Specifically, he asserts that: (1) the term "possess" is unconstitutionally vague and overbroad; (2) the term "material" is unconstitutionally overbroad; and (3) the permissive inference found in subsection (b) of the statute is

unconstitutionally overbroad and violates due process. Upon review, we hold that Tennessee Code Annotated section 39-17-1003 is not unconstitutional on its face.

We note at the outset that we are aware that a panel of this court recently held subsection (b) of the child exploitation statute unconstitutional and, in turn, elided it. State v. Richard Allen Butler, No. E2004-00359-CCA-R9-CD, 2005 Tenn.Crim.App. LEXIS 302 (Tenn.Crim.App., at Knoxville, Mar. 30, 2005), app. denied (Tenn. Aug. 22, 2005). However, upon our research and analysis, we reach a conclusion contrary to that expressed in Butler.

The case before us presents no specific facts to guide us; therefore, we may only find the statute unconstitutional if it is facially invalid. A statute may be facially invalid on First Amendment grounds if it proscribes a substantial amount of "protected expression." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246, 122 S. Ct. 1389,

1399, 152 L. Ed.2d 403 (2002). In that vein, we note that the Supreme Court has held that facial invalidity of a statute is inappropriate where: (1) there are a substantial number of situations to which the legislation might be validly applied; (2) the legislation covers a range of easily identifiable and constitutionally proscribable conduct; or (3) where the legislation is susceptible to a narrowing construction by the courts. Parker v. Levy, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L. Ed.2d 439 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed.2d 830 (1973) (citations omitted). Therefore, our opinion reflects the caution that must be employed when addressing a facial challenge to a statute.

The subject statute states as follows:

Sexual exploitation of a minor

(a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:

(1) Sexual activity; or

(2) Simulated sexual activity that is patently offensive.

(b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.

(c) A violation of this section is a Class E felony.

Analysis

I. "Possess"

The defendant initially contends that the term "possess," as employed in the pertinent statute, is unconstitutionally vague and overbroad because it is not statutorily defined. In support, the defendant states that one "who receives an unsolicited image *via* email or through a pop-up advertisement" could be subject to prosecution under the child exploitation statute. However, upon review,

we conclude that the term possess is neither vague nor overbroad.

Taking the contentions in order, a statute is unconstitutionally vague "if its prohibitions are not clearly defined." Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 531 (Tenn.1993) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed.2d 222 (1972)). Therefore, in order to satisfy the dictates of due process, a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Id. at 532 (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858, 75 L. Ed.2d 903 (1983) (citations omitted)).

In the present case, the defendant argues that the term "possess" leaves too much to the discretion of law enforcement and the courts and allows the prosecution of innocent individuals who electronically "stumble" upon child pornography. In his brief, the defendant isolates the term "possess" to support the proposition that anyone who unwittingly receives material prohibited by the statute could be subject to prosecution. However, the terms of a statute should not be read in isolation but within their context, so as to affect the true intent of the statute. In this case, the term possess, although not defined, is qualified by the term immediately preceding it: knowingly. "'Knowing' refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware

that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-106(a)(20) (2003); see also 7 Tenn. Pattern Jury Instr.-Crim. T.P.I.-Crim. 2.09, at 24 (2004). Furthermore, "possess" is defined in Black's Law Dictionary as, "To have in one's actual control; to have possession of." Black's Law Dictionary 1183 (7th ed.1999).

Bearing these definitions in mind, it is apparent that accidental possession of the prohibited materials is not enough to satisfy the State's burden of knowing possession. Indeed, one who receives an unsolicited email or advertisement that contains child pornography has not overtly acted at all, much less knowingly. Similarly, one who accidentally opens a disguised email or inadvertently visits a web page containing child pornography cannot be said to have acted with awareness that he or she is taking knowing possession of prohibited material. Although the

defendant claims that citizens could "inadvertently, but knowingly 'possess' prohibited images on their computers," this argument, in our view, is oxymoronic and attempts to expand the scope of the statute beyond that which is established by the plain meaning of its terms.

The defendant correctly points out that technological advancements have allowed investigators to see a virtual roadmap of every step an individual takes on their computer, including any images, obtained accidentally or otherwise, containing prohibited materials. However, the same technology that could produce substantial circumstantial evidence of knowing possession, such as repeated visits to a website plainly labeled child pornography or email requests for pornographic images of a child, could be used to exonerate an innocent possessor. Investigators could certainly determine that email messages or "pop-up advertisements" were unsolicited, disguised,

immediately deleted, or even left unopened; ultimately, those types of possessions are not knowing. In sum, when unsolicited material is transferred surreptitiously, the mere presence of that material on the computer hard drive is insufficient to prove knowing possession.

As such, we conclude that the term "knowingly possess" is not unconstitutionally vague, in that it provides fair warning of the conduct prohibited by the statute and prevents "arbitrary and discriminatory enforcement." See Davis-Kidd Booksellers, Inc., 866 S.W.2d at 531-32. The term knowing, which qualifies the term "possess," requires a degree of awareness regarding the nature of the unlawful possession or the contents of the material being possessed. Therefore, the requirement of *knowing* possession eliminates the possibility of an unsolicited or accidental possession being prosecuted under this statute.

The defendant also alleges that the term "possess" is unconstitutionally overbroad. Initially, we note that the Supreme Court has opined that declaring a statute facially overbroad "is, manifestly, strong medicine" and that such a declaration should be employed "sparingly and only as a last resort." Broadrick, 413 U.S. at 613. The Court has further held that "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." Erznoznik v. Jacksonville, 422 U.S. 205, 216, 95 S. Ct. 2268, 2276, 45 L. Ed.2d 125 (1975).

> To maintain an overbreadth challenge, [the defendant] must first show that the statute challenged involves constitutionally protected conduct. If the statute reaches a substantial amount

of constitutionally protected conduct, a defendant must then "demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally."

State v. Burkhart, 58 S.W.3d 694, 700 (Tenn.2001) (citations omitted).

For the same reasons we rejected the defendant's vagueness claim, we likewise reject the facial overbreadth claim. The term "knowingly possess," as used in the statute, sufficiently defines and limits the proscribed conduct to that which is constitutionally unprotected. As we have previously discussed, the defendant's examples of innocent or accidental possession do not come within the purview of the statute because they do not meet the standard of a knowing possession. For this reason, the challenged

statute also does not encompass a substantial amount of constitutionally protected conduct; therefore, the defendant's overbreadth challenge must fail.

II. "Material"

Next, the defendant contends that the term "material" is overbroad. In support, he contends that the statute in question is analogous to the Child Pornography Prevention Act of 1996 (hereinafter CPPA), in that it chills a substantial amount of protected speech that is neither obscene under Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973), nor "intrinsically related" to the sexual abuse of children under New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed.2d 1113 (1982). For this reason, the defendant contends that the statute reaches a substantial amount of protected speech and should be

stricken as facially overbroad. See Burkhart, 58 S.W.3d at 700.

Section 2256(8)(B) of the CPPA prohibited " 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" Free Speech Coalition, 535 U.S. at 241, 122 S. Ct. at 1397. Consequently, in Free Speech Coalition, the Supreme Court declared section 2256(8)(B) unconstitutionally overbroad because it extended to protected speech that was neither obscene nor sufficiently related to the abuse of an actual minor. Id. at 246, 250.

In first analyzing section 2256(8)(B) against the backdrop of Miller, the Court recognized that not every image containing an actor who *appeared* to be a minor

engaging in a sexually explicit activity violated the Miller obscenity test. Id. at 246. As examples, the Court noted several acclaimed films featuring youthful-looking adult actors that could be banned under the CPPA for depicting a theme "within the wide sweep of the statute's prohibitions," without regard to Miller. Id. at 247-48.

Likewise, the Court rejected the Government's argument that the speech proscribed by the CPPA was "virtually indistinguishable from child pornography," which Ferber concluded was *per se* unprotected without regard to Miller. Id. at 249 (citing Ferber, 458 U.S. at 761). Ferber held that the production, distribution, and sale of child pornography were "intrinsically related" to child sexual abuse in two ways: (1) as a permanent record of the child's abuse, whose continued circulation would harm the child participant; and (2) because the trafficking of child

pornography was an economic incentive of its production, the State had an interest in closing the network of distribution. Id. (citing Ferber, 458 U.S. at 759).

In distinguishing Ferber from the CPPA, the Court noted that section 2256(8)(B) proscribed speech that did not record criminal acts and created "no victims by its production." Id. at 250. Further, the Court noted that the CPPA could not be said to comport with Ferber because it prohibited virtual images, an alternative that Ferber relied upon as a permissible form of expression for valuable content that would otherwise be considered child pornography. Id. at 251 (citing Ferber, 458 U.S. at 761, 763).

In the present case, the defendant shapes his argument so as to track the analysis in Free Speech Coalition. In so doing, he relies on what is, in his view, a

substantial similarity between section 2256(8)(B) of the CPPA and the Tennessee child exploitation statute. Specifically, he contends that the two statutes are analogous in that they prohibit both virtual images and material containing actors who merely "appear[ ] to be minors." However, we conclude that the two statutes can be sharply distinguished.

Initially, we note that the aims of the two provisions are substantially different. Excerpts from the legislative history of the CPPA reveal that the purpose of its enactment was to expand the traditional definition of child pornography to the realm of virtual images and material depicting youthful-looking adults:

> Current Federal law, U.S.C. title 18, sec. 2251 et seq., prohibits the sexual exploitation of children for the purpose of producing any visual depiction of a

minor engaging in sexually explicit conduct, and the distribution, possession, receipt, reproduction, sale or transportation of material depicting children engaging in sexually explicit conduct. The term "sexually explicit conduct" is defined at 18 U.S.C. 2256(2). These statutes apply, however, only to visual depictions of children engaging in sexually explicit conduct whose production involved the use of an actual minor engaging in such conduct. Under present law, the Government must prove that every piece of child pornography is of a real minor being sexually exploited. Regrettably, computers and computer imaging technology unheard of only a few short years ago have opened the door to an entirely new means of producing child pornography.

....

S. 1237 will close this computer-generated loophole in Federal child exploitation laws and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-tech child pornography. It would establish, for the first time, a Federal statutory definition of child pornography. Any visual depiction of sexually explicit conduct, however produced, would be classified as "child pornography" if: (a) its production involved the use of a minor engaging in sexually explicit conduct, or; (b) it depicts, or appears to depict, a minor engaging in sexually explicit conduct, or; (c) it is promoted or advertised as depicting a minor engaging in sexually explicit conduct. Under S. 1237, computer-generated child pornographic images, which in real life are increasingly indistinguishable in the eyes of

> viewers from unretouched photographs of actual children engaging in sexually explicit conduct, and can result in many of the same types of harm to children and society, would now also be indistinguishable in the eyes of the law from pornographic material produced using actual children. ...
>
> ... There is no difference between the content of photographs or films depicting such conduct produced using actual children and the content of the computer-generated depictions made contraband under this bill.

S.Rep. No. 104-358, pt. IV(A), (B) (1996). Therefore, the legislative history of the CPPA demonstrates that it expanded the traditional definition of child pornography for the purpose of relieving the prosecution of the burden of

proving actual minority or even that the image depicted a real person.

Turning to the case at hand, we initially note that the instant statute was not directed at what Free Speech Coalition ultimately determined was protected speech but is akin to Ferber in that it proscribes only images resulting from the sexual abuse of actual minors. Although the defendant asserts that our definition of "material" goes further, the plain language of the statute does not support this argument. Indeed, Tennessee Code Annotated section 39-17-1003 is limited to "material that includes a minor engaged in: (1) sexual activity; or (2) simulated sexual activity that is patently offensive," and does not include, within its scope, virtual images or youthful-looking adult actors, as did the CPPA.

We recognize that the defendant's argument is underpinned by the theory that the permissive inference contained in subsection (b) of the statute expands its scope to include the types of protected speech addressed in Free Speech Coalition. However, as is discussed in greater depth *infra*, the permissive inference does not function to broaden the purview of the statute or shift the burden of proof but is an evidentiary device which allows the factfinder to deem circumstantial evidence sufficient to meet the State's burden of proof beyond a reasonable doubt. In our view, the two subsections should be read as they were written, separate and distinct from one another. While the former defines the parameters of the provision, the latter provides an alternate avenue by which the State may meet its burden of proof.

"In interpreting statutes the legislative intent must be determined from the plain language it contains, read in

the context of the entire statute, *without any forced or subtle construction which would extend or limit its meaning.*" *National Gas Distributors, Inc. v. State,* 804 S.W.2d 66, 67 (Tenn. 1991) (citing *Metro. Gov't of Nashville and Davidson County v. Motel Systems, Inc.,* 525 S.W.2d 840, 841 (Tenn.1975)) (emphasis added). We conclude that reading the two subsections as if they were one substitutes the intended construction with one that is forced and that expands the scope of the statute beyond what the Legislature intended. A plain reading of subsection (a) leads us to the conclusion that "material," as it is used in our statute, does not chill a substantial amount of protected speech and, therefore, is not overbroad.

III. Inference of Minority

Finally, the defendant asserts that the inference of minority, found in subsection (b) of the statute in question,

is overbroad and violates due process by shifting the burden of proof from the prosecution to the defendant. In support of his arguments, the defendant draws an analogy between section 2256(8)(D) of the CPPA, found to be unconstitutionally overbroad in Free Speech Coalition, and the Tennessee statute. However, we reiterate that distinctions between the CPPA and the Tennessee statute exist, which are dispositive of both issues.

The subsection at issue states:

(b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.

Tenn. Code Ann. § 39-17-1003 (2003). Section 2256(8)(D) of the CPPA included in its definition of child pornography, "any sexually explicit image that was 'advertised,

promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts 'a minor engaging in sexually explicit conduct.'" Free Speech Coalition, 535 U.S. at 242. As we have previously noted, this expanded definition relieved the prosecution of being required to prove that the material depicted an actual minor. Although the Supreme Court never squarely addressed the due process implications of the Act, it held that any affirmative defense that may be asserted by a defendant would be "incomplete and insufficient," because a defendant could "be convicted in some instances where they can prove children were not exploited in the production." Id. at 256. Therefore, because the section was constitutionally overbroad, no affirmative defense could save it. Id.

In contrast, although the Tennessee statute contains a permissive inference of minority based upon the context

of the image, it neither renders the statute facially overbroad nor makes it violative of due process. As we have previously noted, the CPPA was invalidated because it contained *within its scope* a substantial amount of protected speech, which was not obscene under *Miller* or related to the abuse of an actual minor under *Ferber*. However, the subsection before us does not expand the definition of child pornography to protected forms of speech, as was the case with the CPPA, but rather serves as an evidentiary device that is distinct from subsection (a), which defines the scope of the statute.

The Supreme Court has previously opined that:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime-that is, an

> "ultimate" or "elemental" fact-from the existence of one or more "evidentiary" or "basic" facts.

County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed.2d 777 (1979) (citations omitted). Furthermore, in order for a permissive inference to pass constitutional muster, the connection between the proven and presumed facts must be rational on its face or rational based on the facts of the given case. See id. at 165.

In light of the most recent findings, we conclude that the requisite connection is established. Following the decision in Free Speech Coalition, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, replacing the constitutionally infirm portions of CPPA. The PROTECT Act demonstrated a marked change from the

CPPA, both in Congress' opinion as to the existence and volume of virtual child pornography and its philosophy on the prosecution of such images. While the CPPA was premised on the notion that virtual images could be produced easily and with minimal expense, the PROTECT Act came to a contrary conclusion:

> (11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise *is-and for the foreseeable future will remain-prohibitively expensive.* As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real children. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of

> real children to make them unidentifiable or to make them appear computer-generated.

H.R.Rep. No. 108-66, at 501(11) (2003) (emphasis added). This conclusion is in accord with, and perhaps a result of, Justice Kennedy's reaction to the government's argument that virtual images comprised a substantial part of the child pornography market:

> Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes.

> Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

Free Speech Coalition, 535 U.S. at 254. Therefore, absent any evidence that virtual pornography would be mistaken for pornography depicting real children, the correlation between proven fact and the inference grows stronger. Until there is some indication that virtual child pornography is being produced, we conclude that the connection between the appearance or depiction of an individual as a minor and the permissive presumption of minority is substantial and certainly withstands constitutional scrutiny.

Moreover, even absent the inference, it is well-settled that "circumstantial evidence alone may be sufficient to support a conviction." State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993) (citing State v. Buttrey, 756

S.W.2d 718, 721 (Tenn. Crim. App. 1988)). Furthermore, it is the province of the jury to determine the weight given to circumstantial evidence, "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence." Marable v. State, 203 Tenn. 440, 313 S.W.2d 451, 457 (Tenn. 1958); see also Gregory, 862 S.W.2d at 577; State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985). The inference found in subsection (b) simply listed examples of the circumstantial evidence that may properly be considered by the factfinder in determining whether or not the actor was a minor.

Furthermore, as a practical matter, it is a formidable task for the State to prove, by direct evidence, the age of every subject in all prosecutions under this section. For example, if the material is sold or transferred via the

internet, the State may not even be able to determine the name of the depicted individual, where the individual lives, or his or her age at the time the material was produced. *See State v. Michael J. Morris,* No. 04CA0036, 2005 Ohio App. LEXIS 621 (Ohio Ct. App. Feb. 16, 2005). Therefore, this subsection makes clear that the State may meet its evidentiary burden by the presentation of circumstantial evidence, which in many cases may be the only proof available to the prosecution. Further proof of the evidentiary basis of subsection (b) is found in its recent amendment:

> In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and

> any other relevant evidence in determining whether a person knowingly possessed the material or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

2005 Tenn. Pub. Acts ch. 496. By this amendment, the Legislature is clearly indicating its desire to include alternative methods of proving child exploitation.

For these reasons, we distinguish the Tennessee child exploitation statute from the CPPA and conclude that the permissive inference does not expand the scope of the statute to a substantial amount of protected speech, so as to render it facially overbroad. Rather, this permissive inference states explicitly what is well-settled: that the State's burden to prove actual minority may be met by circumstantial evidence.

Finally, the defendant alleges that the inference permitted by subsection (b) "wholly relieve[s]" the State of its burden to prove the age of the actor beyond a reasonable doubt, thereby violating the dictates of due process. We disagree. As was noted by the Supreme Court two decades ago, "[a] permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Francis v. Franklin,* 471 U.S. 307, 314, 105 S. Ct. 1965, 1971, 85 L. Ed.2d 344 (1985).

Our courts have consistently held that, while presumptions (with the exception of the presumption of innocence) should be avoided in criminal cases, "juries may be instructed that a permissible inference may or may not be drawn of an elemental fact from proof by the State of a

basic fact, but that such an inference places no burden of proof of any kind upon [the] defendant." *State v. Sensing*, 843 S.W.2d 412, 417 (Tenn.1992) (quoting *State v. Martin*, 702 S.W.2d 560 (Tenn.1985) and citing *State v. Bolin*, 678 S.W.2d 40, 44-45 (Tenn.1984)).

In conclusion, we reiterate that the Tennessee statute neither included in its provisions the protected speech that was proscribed by the CPPA nor was it aimed at such speech. Moreover, the permissive inference of minority does not expand the scope of the statute to include virtual images and youthful-looking actors but merely allows the trier of fact to deem the circumstantial evidence before them sufficient proof that the subject material portrayed an actual minor. This is vastly different from the CPPA, whose scope was far greater and required defendants to, almost without fail, work from a deficiency in an attempt to prove

that the speech was not unlawful under the far-reaching bounds of the Act.

Conclusion

Based upon the foregoing, we affirm the trial court's denial of the motion to dismiss.

/s/_____

JOHN EVERETT WILLIAMS, JUDGE

In the Criminal Court for Davidson County, Tennessee,

at Nashville

Division I
STATE of Tennessee
v.
Gregory T. HARWOOD.
No. 2003-B-843.
July 13, 2004
ORDER

This matter came before the Court upon the defendant's motion the indictment alleging that statue under which the defendant is charged is unconstitutional. The defendant additionally filed a motion to dismiss counts two, three and four of the indictment alleging multiplicity. The defendant is indicted and charged with four counts of Sexual Exploitation of a multiplicity. The defendant is indicted and charged with four counts of Sexual Exploitation of a Minor which are violations of Tenn. Code Ann. 39-17-1003. The Court did not hear any proof at the

hearing and solely considered each parties' memorandum in making its findings.

The defendant's assertion that Tenn. Code Ann. 39-17-4003 is unconstitutional is based on the following arguments: (1) that the definition of "Material" in Tenn., Code Ann. 39-17-1003 is overbroad and vague; (2) that the definition of "Possess" in Tenn. Code Ann. 39-17-1003 is overbroad and vague; (3) that the provision in Tenn. Code Ann. 39-17-1003 which allows the trier of fact to "infer" that a participant is a minor or is represented as a minor, directly violates the fee speech decision.

Generally, under the plain language of Rule 12(b) and (e), once a pretrial motion is made, a trial court must decide the motion before the trail if the motion is "capable of determination without the trial of the general issue." Tenn. R. Crim. P. 12(b); *See also State v. Vickers, 970 S.W.2d 444, 447(Tenn. 1998).* This rule avoids the

necessary interruption and inefficiency of removing the jury from the courtroom to conduct a hearing on motions filed during the course of trail, and the rule ensures the right of the state to appeal an adverse ruling of the trial court without implication double jeopardy considerations. *State v. Randolph*, 692 S.W.2d 37, 40 (Tenn. Crim. App.). Motions are ordinarily capable of determination before trail if they raise questions of law rather than question of fact. *See, United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976). However, subsections (e) and (g) of Rule 12 clearly envision that a trial court may make findings of fact necessary to decide the questions of law presented by a pre-trial motion so long as the factual findings are not intertwined with the general issue of guild or innocence. *Vickers* at 447. Where the factual findings necessary to resolve the motion are not intertwined with the general issue, a ruling must be deferred until trial since, in criminal

cases, there is simply no pre-trial procedure akin to a summary judgment for adjudicating question of fact involving the general issue of guilt or innocence.

The defendant's first two contentions are that the definitions of "Material" and "Possess" in Tenn. Code Ann. 39-17-1003 are overbroad and vague. The Due Process Clauses of the Fifth and Fourteenth Amendments provide the constitutional foundation for the void-for-vagueness doctrine. *See, e.g., United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). A vague ordinance violates the Constitution in two significant respects: (1) such an ordinance fails to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct, and (2) such an ordinance fails to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. *See, e.g. Kolender v. Lawson*, 461 U.S. 352, 257 (1983).

To survive a challenge for vagueness, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994). *perm. to appeal denied* (Tenn. 1995)(citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). In other words, the constitutional test for vagueness is whether a statute's prohibitions are not clearly defined and are thus susceptible to different interpretations as to what conduct the statute actually proscribes. *State v. Forbes*, 918 S.W.2d 431, 447-48 (Tenn. Crim. App. 1995); *see also Grayned*, 408 U.S. at 108; *Baggest v. Bullitt*, 377 U.S. 360, 367 (1964).

A statute is void for vagueness, therefore, if is so vague, indefinite, and uncertain that persons must speculate as to its meaning. *State v. Whaley*, 982 S.W.2d 346, 348 (Tenn. Crim. App. 1997). Nonetheless, the vagueness

doctrine does not invalidate every statue that a reviewing court believes could have been drafted with better precision. *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990). This court must determine legislative intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any force or subtle construction that would extend or limit the statute's meaning." *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000).

When reviewing a statute for a possible constitutional infirmity, courts are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995); *Dykes v. Hamilton County*, 191S.W.2d 155, 159 (Tenn. 1945); *State v. Joyner*, 759 S.W.2d 422, 425 (Tenn. Crim. App. 1987). A party challenging the constitutionality of a statute has the burden

of rebutting the presumption that the statute is constitutional. *Helms v. Tennessee Dep't of Safety*, 987 S.W.2d 545, 549 (Tenn. 1999); *State v. Blanton*, 975 S.W.2d 269, 286 (Tenn. 1998).

A party challenging the constitutionality of a statute may challenge the statue as unconstitutional on its face or unconstitutional as applied to that party's case. *See, e.g., State v. Burkhart*, 58 S.W.2d 694 (Tenn. 2001). Here, the Defendant raises both challenges, which the Court shall address in detail below.

When examining a facial challenge, the court must first "determine whether the enactment reaches a substantial amount of constitutionality protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Where the enactment does not reach constitutionality protected conduct, the complainant may succeed in a vagueness claim "only if the enactment is

impermissibly vague in all of its applications." *Id.* at 495. Therefore, vagueness claims not involving First Amendment freedoms must be examined in light of the facts of the particular claims at hand and not as to the statute's facial validity. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 n.6 (6th Cir. 1995)(limiting vagueness challenge to an "as applied" analysis since the case did not implicate First Amendment rights); *United States v. Avant*, 907 F.3d 623, 625 (6th Cir.1990)(reviewing vagueness challenge to statue not involving First Amendment rights on the facts of that specific case)(citing *United States v. Mazurie*, 419 U.S. 544 (1975)). However, even in cases not involving First Amendment rights, courts may engage in a facial analysis where the enactment imposes criminal sanction. To bring a facial challenge against a statute, the challenging party must prove that no set of circumstances exist under which the act would be

valid. *Davis-Kid Booksellers, Inc. v. McWherter*, 866 S.W.2d 250, 525 (Tenn. 1993)(quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Thus, in this case, in order to prove that the Sexual Exploitation of Minor statute as set forth in Section 39-17-1003 of the Tennessee Code, is unconstitutional, the Defendant bears the burden of demonstrating that there are no set of circumstance exist under which the Act would be valid.

The defendant's position is that the term "material" is overbroad and vague and has the effect of suppressing speech that is protected by the First Amendment in violation of *Ashcroft v Free Speech Coalition*, 535 U.S. 234 (2002). The Court agrees with the State's position with regards to the term "material". The term "material" is defined in Tenn. Code Ann. 39-17-1002 (2004) as:

2) "material" means:

(A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation;

(B) Any statute, figure, theatrical production or electrical reproduction; or

(C) any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval.

The defendant maintains that the this [sic] statute runs afoul to those principles enunciated in *Ashcroft*. However, the Court respectfully disagrees with this position. The United States Supreme Court held in *Ashcroft* that virtual child pornography was constitutionality protected free speech under the First Amendment. The Court finds that the definition of "material" has to be read

in conjunction with the definition of "minor", which is anyone under the age of 18 years of age. Reading both definitions in context with the other imply that the legislation is concerned with real tangible victims and not cartoon or virtual victims and therefore requires the State to prove the age element beyond a reasonable doubt. Furthermore, the Court is satisfied that the definition of "material" provided by the legislature adequately apprizes citizens which conduct(s) are prohibited.

The defendant maintains that the *Ashcroft* decision is in place to protect free speech and pursuant to a system of checks and balances to protect popular culture. According to the defendant, the *Ashcroft* decision allows for movies like American Beauty and Romeo and Juliet to be part of our culture without allowing for prosecution of the theater owners and patrons (if viewing was found a form of possession). The Court is aware of these movies and does

not recall any explicit scenes of minor engaged in sexual activity. However, the Court agrees that if a like movie was filmed in Tennessee and one of the actors were over the age of majority and the other is not, criminal prosecution may very well lie for a minor engaged in "sexual activity." Movies depicting minors engaging in sexual activity is protected speech, but actual minors in such participation is not. These kinds of fact specific questions are only proper for the trier of fact and not proper for resolution under Rule 12 of the T. R. Crim. P.

The defendant also contends that the definition of "Possess" in Tenn. Code Ann. 39-17-1003 is overbroad and vague. Defense counsel contends that standard definitions of possession are not applicable to the crimes charged as a result of images stored on a computer. The defendant asserts that under Tenn. Code Ann. § 39-17-1003(a) it would be a factual impossibility for the defendant to

"knowingly possess" child pornography given current computer technology. Specifically, computers generated pictures make it virtually indistinguishable whether the photos in question are actual depictions of minors, or virtual computer generated images. Second, if the statute is read to only allow the state to prosecute persons who "knowingly possess" images of *real* children, then the statute must fail when it allows the trier of fact to "infer that the participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor." See Tenn. Code Ann. § 39-17-1003(b). Although the defendant and the State cite persuasive authority for their respective positions as to possession, the statute in question requires the state to show "knowing possession" of these materials. The defendant submits that there is nothing in the statute that requires the State to prove this element. To the contrary, Tennessee law

all requires mental states which are elements of the crime to be proven by the State. *See State v. Wilson*, 924 S.W.2d 648 (1995).

The Court acknowledges that the statute in it is current form could have serious problems in the future[3], the Court has before it a rule 12 motion requesting relief. Notwithstanding the Court's discussion on this issue, the Court finds that the defendant is raising issues that are questions for the trier of fact and not appropriate for resolution under Rule 12 of the Tennessee Rules of Criminal Procedure. Whether the defendant was in "knowing possession" is a question for the trier of fact.

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[3] Potentially a citizen could access a sports web site and receive "pop-ups" containing unsolicited child pornography. That is why the legislature included the term "knowingly possess" to allow the jury to weigh the evidence and decide if the evidence was "knowingly possesse[d]".

The defendant's final argument regarding the constitutionality of the statute is that it allows the trier of fact to "infer" that a participant is a minor or is depicted to be a minor, directly violates the free speech decision. The defendant argues this inference created by the statute unconstitutionally shifts the burden of proof to the defendant to prove the age of the person depicted in the photograph or that the image is real as opposed to virtual. However, in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), the United States Supreme Court did not find it necessary to determine whether the government could impose such a burden on a "speaker." *Id* at 1404. The Court is of the opinion that the statue expressly creates a permissive inference not a mandatory presumption by the use of the language "may infer." A mandatory presumption requires the trier of fact to presume a certain fact unless the defendant can submit evidence to rebut the presumption,

while a permissive inference allows, but does not require, the trier of fact to infer a fact from the state's proof without placing any burden on the defendant. *Tennessee v. Bonam*, 7 S.W.3D 87 (Tenn. 1999); *see also State v. Bolin*, 678 S.W.2d 40, 42 (Tenn. 1984). Applying the aforementioned principles, the Court is of the opinion that theses [sic] issue, in the defendant's pre-trial motion, present questions of law and fact that are so intertwined with the issue of the defendant's guilt or innocence that they are not capable of determination without a trial of the general issue. *See State v. Goodman*, No. M2001-00036-SC-R11-CD, (Tenn. November 22, 2002).

The final issue for resolution before the Court is whether counts two, three and four violate the constitutional prohibition against multiplicity. Defense counsel is relying on *State v. Mays*, 2002 WL 158643 (Tenn. Crim. App. July 18, 2002) to bolster the defendant's position that he is being

charged under a multiplicious indictment. However, the *Mays* court recognized that the trial court could merge the offenses prior to the trial or after considering the proof. *See also State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). Based on the proof at trial the Court may decide that consolidation is appropriate under the law. In Blockburger v. United States, 284 U.S. 299 (1932), the United States Supreme Court dealt with the issue of whether the violation of two distinct statutory provisions during the course of a single criminal episode constituted two offenses or only one. The Court, quoting *Wharton's Criminal Law (11th edition) § 34,* state "the test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. If the later, there can be but one penalty."

Each count of the indictment charges the defendant with possession of this material on October 22, 2002. Thus, the Court is of the opinion each individual act of allegedly downloading images to a disk or hard drive could constitute a separate and distinct offense. Each said activity can be proven by the state, if not, then further motions can address any proof issues.

Based on the foregoing analysis, the Court is of the opinion that the defendant's motions should be respectfully denied.

Entered this 13th day of July 2004.

/s/ _____
Steve R. Dozier, Judge
Criminal Court, Division I

In the Criminal Court for Davidson County, Tennessee,
at Nashville, Division I
STATE of Tennessee
v.
Gregory T. HARWOOD.
No. 2003-B-843.
July 19, 2004
ORDER

This cause came to be heard on July 15, 2004, upon the defendant's motion for a stay and interlocutory appeal pursuant to Tenn. R. App. P. 9. The defendant is indicted and charged with four counts of Sexual Exploitation of a Minor which are violations of Tenn. Code Ann. 39-17-1003. The Court did not hear any proof at the hearing and solely considered each parties' memorandum in making its findings. On July 13, 2004, the Court entered an order denying the defendant's motion to dismiss the indicted on constitutional grounds. Following the hearing, the Court took the matter under advisement.

Rule 9(a) of the Tennessee Rules of Appellate Procedure state the following considerations must be given when deciding whether an interlocutory appeal is appropriate:

> (a) Application for Permission to Appeal; Grounds. —Except as provided in Rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable

injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be

> reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment.

Pursuant to Rule 9(b) of the Tennessee Rules of Appellate Procedure, the trial court must make the following findings in writi8ng to effectively confer jurisdiction upon the Tennessee Criminal Court of Appeals. *See State v. Gawlas*, 614 S.W.2d 74 (Tenn. Crim. App. 1980).

> The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court of the opinion those criteria are satisfied; and (3) any other factors leading the trial court to

> exercise its discretion in favor of permitting an appeal. The appellate court may thereupon in is discretion allow an appeal from the order.

The Court heard agreement that the defendant would suffer irreparable harem from any conviction that resulting from these charges. Specifically, the defendant's agreement is that he would lose his job, have to register as a sex offender, and undergo the stigma associated with being a convicted felon. The defendant is currently maintaining employment as a computer programmer to support his family. The defense asserts that even if the defendant were successful on his direct appeal, it would be impossible to erase the harm of such conviction.

The next factor the Court must consider is the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the

probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed. Defense counsel asserts that if this matter went to trial it would take an exorbitant amount of time to hear all of the proof. According to the defense, the jury would have to wade to complex technical issues that would require numerous witnessed and experts. Undoubtedly, if the Court of Criminal Appeals ruled in the defendant's favor and found the statute unconstitutional, this would save the State the expense of having to bring in prospective jurors and free the Court's docket for other trials involving incarcerated defendants.

The final factor the Court must consider is the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will

not otherwise be reviewable upon entry of final judgment. According to the defendant, the Court of Criminal Appeals already has two cases under review dealing with the very same issue. Furthermore, the Court finds that the recent decision from the United States Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) renders certain portion of Tenn. Code Ann. § 39-17-1003 in need of clarification.

The Court finds that the criteria listed in Rule 9(a) of the T.R.A.P. have been satisfied by the arguments presented by the defendant and the Court's research on the matter. Based on the foregoing analysis, the Court finds that the defendant's prosecution should be stayed and the defendant's motion for interlocutory appeal granted.

Entered this 16th day of July, 2004.

/s/_____
Steve R. Dozier, Judge
Criminal Court, Division I

IN THE CRIMINAL COURT FOR DAVISON COUNTY, TENNESSEE DIVISION I

STATE OF TENNESSEE	)
	)
	)
v.	)**No. 2003-B-843**
	)
GREGORY HARWOOD	)

MOTION FOR PERMISSION TO APPEAL AND APPLICATION FOR A STAY
July 14, 2004

The defendant, Gregory Harwood, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, hereby request that this Honorable Court grant him permission to appeal this Court's denial of the defendant's "Motion to Dismiss the Indictment and Memorandum of Law in Support of Motion to Dismiss" and that this Court further issue a stay as to the proceedings against Mr. Harwood until such time as the appeal of this dispositive issue is resolved.

In support of this Motion the defendant would show as follows:

1. That the defendant, through counsel, filed a "Motion to Dismiss the Indictment and Memorandum of Law in Support of Motion to Dismiss" in this Honorable Court on May 4, 2004, attacking the constitutionality of T.C.A. § 39-17-1003.

2. That an order was entered on July 13, 2004 overruling the "Motion to Dismiss the Indictment and Memorandum of Law in Support of Motion to Dismiss".

3. That the defendant believes that an immediate interlocutory appeal of this issue is appropriate because:

   a. such an appeal would prevent irreparable injury, in that Gregory

Harwood is indicted for offenses for which, if convicted, he would be placed on the Sex Offender Registry and would subsequently lose his job as a computer programmer and his ability to provide for his family. Even if Mr. Harwood eventually prevailed on this issue on appeal, it is impossible to erase the harm that such a conviction, even temporary and under an unconstitutional statute, would cause.

b. Such an appeal would prevent needless, expensive, and protracted litigation, as the challenged order addresses the constitutionality of T.C.A. § 39-17-1003 and, if the

statute is indeed held to be unconstitutional as defense counsel asserts, then such a finding would be a basis for an automatic reversal of any conviction which might occur.

c. Such an appeal would assist in developing a uniform body of law. Mr. Harwood would point out that there are two current Tennessee cases pending in the appellate system, both addressing the constitutionality of T.C.A. § 39-17-1003. In the first such case, State of Tennessee v. Richard Allen Butler, No. 76909 (trial court Order attached as Exhibit A), the defendant alleged the same constitutional infirmities set forth in

this case. The trial court in Butler actually struck down the portion of the statute that allows an inference that the image involves a minor, finding that portion to be unconstitutionally overbroad. The trial court, however, severed that portion of the statute from the others and upheld the remaining portions of the statute. Defense counsel in Butler requested an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure and permission was granted by the trial court (See Notice of Appeal, attached as Exhibit B.) The Butler case is currently pending

in the Court of Criminal Appeals. The second such case is State v. Pickett, No. 2002-C-1439, a case which was tried before this Court. In Pickett, the defendant attacked the constitutionality of the same statute at issue in Mr. Harwood's case. The defendant's case is currently on appeal. Mr. Harwood would thus assert that the issues presented in this Motion are actually in the appellate system in at least those two other cases. Hence, clearly, an interlocutory appeal of this matter, to join the appeal of State v. Butler, supra, which his already on interlocutory appeal, is warranted to

assist in developing a uniform body of law.

4. That a stay of the proceedings is necessary to litigate this claim in the Court of Appeals under Rule 9(f) of the Tennessee Rules of Criminal Procedure.

5. That the prosecutor in this case, Mr. Brian Holmgren, has advised that he does not oppose this request.

Therefore, the defendant would move for an order of this Court allowing an appeal as well as a stay of the case.

Respectfully submitted,

/s/_____
JODIE A. BELL
Attorney for Gregory Harwood

/s/_____
WENDY S. TUCKER
Attorney for Gregory Harwood

IN THE CRIMINAL COURT FOR DAVISON COUNTY, TENNESSEE DIVISION I

STATE OF TENNESSEE	)
	)
	)
v.	)**No. 2003-B-843**
	)
GREGORY HARWOOD	)

MOTION TO DISMISS INDICTMENT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Filed May 4, 2004

COMES the Defendant, Gregory Harwood, by and through counsel, pursuant to Article 1 §§ 8, 9 and 19 of the Tennessee Constitution and the First and Fourteenth Amendments to the United States Constitution, moves this Honorable Court to dismiss the indictment against Mr. Harwood due to the overbroad and vague construction of Tennessee's sexual exploitation of a minor statute, Tenn. Code Ann. § 39-17-1003.

I. INTRODUCTION

The question of the constitutionality of Tenn. Code Ann. § 39-17-1003 is one of first impression in Tennessee since the Supreme Court decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Under a post-Free Speech analysis, it is apparent that Tennessee's sexual exploitation statue is constitutionally overbroad and vague and chills a substantial amount of protected speech under the First Amendment.

Mr. Harwood is charged in the above-referenced indictment with unlawfully, feloniously, and knowingly possessing materials that allegedly include minors less than eighteen (18) years of age, engaged in sexual activity in violation of Tenn. Code Ann. § 39-17-1003. T.C.A section 39-17-1003 does not pass constitutional scrutiny and denies

Mr. Harwood his rights to free speech[4], as well as substantive and procedural due process rights pursuant to the Tennessee and United States Constitutions.

II. MEMORANDUM OF LAW

Tennessee's sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, clearly does not withstand constitutional scrutiny for several reasons. First, the term "material" as used in Tenn. Code Ann. § 39-17-1003(a) and defined in Tenn. Code Ann. § 39-17-1002(2)(A)-(C), is overbroad and vague and chills a substantial amount of protected speech under the First Amendment. Second, the use of the term "possess" in Tenn. Code Ann. § 39-17-1003(a), which is not defined in the statute, allows for overbroad and vague interpretations of the term by judges, prosecutors, and juries. Third, the ability of the trier of fact

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[4] The defendant, by challenging the statute, in no way admits that he knowingly possessed the alleged child pornography at issue in this case.

to "infer" that the proscribed material uses a minor, or depicts the participant as a minor in Tenn. Code Ann. § 39-17-1003(b), violates fundamental constitutional rights of free speech and due process, and is in direct violation of the Supreme Court's recent decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

A. THE EFFECT OF *ASHCROFT V. FREE SPEECH COALITION.*

In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the United States Supreme Court found that sections of the Child Pornography Prevention Act of 1996 (CPPA) were overbroad and vague and abridged a person's right to engage in a substantial amount of protected speech under the First Amendment. Id. at 234. The Court in Free Speech held that the CPPA was inconsistent with the rulings of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) and New York v. Ferber, 458 U.S.

747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The Miller standard required that the Government prove that the work in question, taken as a whole, appealed to the prurient interest, was patently offensive in light of community standards, and lacked serious literary, artistic, political, or scientific value. Id. at 235 (*citing* Miller, 413 U.S. 24). The CPPA prohibited materials that meet the Miller test. Id. at 235. Under the CPPA materials did not need to appeal to the prurient interests[5]. Id. at 235. Any material that depicts sexually explicit material, no matter how it was presented, of people under the age of eighteen engaged in sexual activity was proscribed. Id. at 235. As a result, the CPPA prohibited speech that has serious redeeming value. Id. at 235. The Court in Free Speech stated:

> [T]eenagers engaging in sexual activity- that is a fact of modern society and has been a

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[5] Similarly here, the defendant is not charged with possessing materials that appeal to any prurient interest. See Indictment.

> theme in art and literature for centuries. A number of acclaimed movies, filmed without any child actors, explore themes within the wide sweep of the statute's prohibitions. If those movies contain a single graphic depiction of sexual activity within the statutory definition, their possessor would be subject to severe punishment without inquiry into the literary value of the work. This is inconsistent with an essential First Amendment rule. . .

The CPPA's broad sweep of any material, regardless of prurient interest was a clear affront to the constitutional liberties guaranteed by the First Amendment.

The United States Supreme Court also held that the CPPA violated the holding in Ferber. Ferber upheld a prohibition of the sale, distribution and production of child pornography because these acts were "intrinsically related"

to the sexual abuse of children in two ways. Id. at 235 (*citing* Ferber, 458 U.S. 759). First, such acts were a permanent record of the child's abuse, and the continued circulation would be harmful to the child who had participated. Id. at 235 (*citing* Ferber, at 759). Second, the State had an interest in closing the child pornography distribution network because of the economic motivation for its production. Id. at 235 (*citing* Ferber at 760).

Based on either of these rationales, the Ferber holding was limited to banning speech that was a proximate link to the criminal conduct set forth in the statute. Id. at 236. Ferber banned speech that itself was the record of sexual abuse whereas the CPPA, and Tenn. Code Ann. § 39-17-1003, prohibited speech that recorded no crime and created no victims by its production, i.e. "virtual child pornography" or materials that use youthful looking adult actors or models. Id. at 236.

While the Court in Free Speech focused much of its analysis on "virtual child pornography" the Court clearly and unequivocally, stated that it was impermissible to ban speech based on the speech that is presented, not on what is depicted. As a result, the Court in Free Speech held that the "conveys the impression" provision of the CPPA was overbroad. Id. at 237. Such language requires little judgment about the image's content, all that is required was that the work was sexually explicit, but otherwise the content was irrelevant. Id. at 237. The Court opined:

> Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on how the speech is presented, not on what is depicted. . .it bans possession of material pandered as child

> pornography by someone earlier in the distribution chain, as well as sexually explicit film that contains no youthful actors but has been packaged to suggest a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled.

The Court concluded:

> The First Amendment requires a more precise restriction.

It is clear that the Free Speech Court mandates that all statutes aimed at limiting First Amendment protections be narrowly tailored and precise.

B. THE DEFINTION OF "MATERIAL" IN TENN. CODE ANN. § 39-17-1003 IS OVERBROAD AND VAGUE.

Tennessee's sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, is unconstitutional because it is

overbroad and vague and has the effect of suppressing speech that is protected under the First Amendment. The Supreme Court analysis in Free Speech, is directly applicable to the language of Tenn. Code Ann. § 39-17-1003.

Tennessee's sexual exploitation statute reads:

(a) it is unlawful for any person to knowingly possess material that includes a minor engaged in:

(1) Sexual activity; or

(2) Simulated Sexual activity that is patently offensive.

> (b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.

There are three main areas within Tenn. Code Ann. § 39-17-1003 that do not withstand constitutional scrutiny post-Free Speech. First, Section (a)-(b) proscribes any material that includes a minor engaged in sexual activity. Tenn. Code Ann. § 39-17-1002(2)(A)-(C) defines material as: any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation; any statue, figure, theatrical production or electrical production; or any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval. This overbroad definition, like the CPPA, fails under both Miller and Ferber analysis.

As with the CPPA, under § 39-17-1002(2)(A)-(C) any material, even if it meets the Miller test: does not appeal to prurient interests, is not patently offensive, or has serious literary, artistic, political, or scientific value, is

proscribed. Under the CPPA and Tenn. Code Ann. §39-17-1003, material is prohibited as long as the persons appear to be less than eighteen. As discussed in Free Speech, teen sexuality and activity have been constant themes in art and literature throughout the ages. Id. at 246. Works such as William Shakespeare's *Romeo and Juliet*, which revolves around a pair of teenage lovers, and Maya Angelou's *I Know Why the Caged Bird Sings*, which details a true account of a young girl being raped by an older man, are examples of literature that contain such material.

Many motion picture movies also feature sexually explicit scenes of minors engaged in sexual activity. For instance, Romeo and Juliet (B. Luhrmann director, 1996) suggested that the young couple of this Shakespearean play consummated their relationship. Id. at 247. Also, the movie Traffic, which was nominated for best picture, depicts a graphic scene where a 16-year old girl becomes

addicted to drugs and eventually degrades herself by trading sex for drugs. Id. at 248. Also, the movie American Beauty, which won an Academy Award for Best Picture, includes scenes where a teenage girl develops sexual relations with her teenage boyfriend, another teenage girl gives herself to the desires of a middle-aged man, and a man mistakenly believes that he is watching a teenage boy performing oral sex on an older man. Id. at 248.

Additionally, the lack of a prurient interest standard as required by Miller overly restricts areas where a person or profession may possess these materials for perfectly innocent reasons. For example, academic researchers, psychologists, authors, journalists, gender and child studies experts, social workers, lawyers representing clients, human sexuality scholars, criminologists, sociologists, college students working on research projects on child sexual abuse, etc., may all have innocent reasons to research the

extent of child pornography on-line or in literature and movies. As a result, in Tennessee these people could all be held criminally liable under Tennessee's sexual exploitation statute if they knowingly possessed the proscribed material. It would be irrelevant that the possessor of the proscribed material had no prurient interests, despite the fact that the image is not patently offensive, and despite the fact that the above-referenced material may have serious literary, artistic, political, or scientific value.

The definition of "materials" also fails to meet the Ferber test. As stated earlier, Ferber upheld a prohibition of the sale, distribution and production of child pornography because these acts were "intrinsically related" to the sexual abuse of children. Id. at 235 (*citing* Ferber, 458 U.S. 759). Tenn. Code Ann. § 39-17-1003 prohibits materials that are not "intrinsically related" to the sexual abuse of children. The sweeping definition of "materials" allows for

prosecution for many protected forms of speech, such as "virtual child porn," films that are marketed as child pornography despite not containing any youthful actors, and films or pictures using adult actors or models that look like they are under eighteen. Like the CPPA, the language of Tenn. Code Ann. § 39-17-1003 applies a blanket ban on speech that does not use children and hence is not intrinsically linked to the sexual abuse of children, and therefore is unmistakably protected speech.

When reviewing a statute under the overbreadth doctrine, the Court must look to see if the enacted statute reaches a substantial amount of constitutionally protected speech. State v. Bonner, 61 P.3d 611, 614 (Idaho Ct. App. 2002) (*citing* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494, 102 S. Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982)). It has been held that if the "overbreadth is 'substantial,' the law may not be enforced

against anyone, including the party before the court, until it is narrowed to reach only unprotected activity." Id. at 614 (*citing* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S. Ct. 2794, 2801, 86 L. Ed.2d 394, 405 (1985)).

It is clear that the definition of "materials" in Tenn. Code Ann. § 39-17-1003(a) substantially prohibits a large amount of protected speech. Such an overbroad prohibition of materials in § 39-17-1002(2)(A)-(C), without any prurient interest standard, as required under Miller, and such an overbroad and vague definition of "material" which finds no support in Ferber, is unconstitutional and deprives the citizens of the State of Tennessee of their constitutional right to engage in a substantial amount of protected speech under the First Amendment. Specifically, the sexual exploitation statute may not be enforced against Mr. Harwood until the statue is constructed more narrowly to reach only unprotected activities.

C. THE USE OF THE TERM "POSSESS" IN TENN. CODE ANN. § 39-17-1003 IS OVERBROAD AND VAGUE.

Tenn. Code Ann. § 39-17-1003 is also overbroad and vague because there is no statutory definition provided for "possess." The Supreme Court has held that it is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 531 (Tenn. 1993) (*citing* Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972)).

The Greyned Court gave several reasons why vagueness laws are unconstitutional. Id. at 531 (*citing* Greyned, at 108-109). First, we assume that a person is free to steer between lawful and unlawful conduct, laws must give a person of ordinary intelligence a reasonable

opportunity to know what it prohibited, so that he/she can act accordingly. Id. at 531 (*citing* Greyned, at 108-109). The Court warns, "vague laws can trap the innocent." Id. at 531 (*citing* Greyned, at 108-109). Second, laws must provide explicit standards for those who apply them so as to prevent arbitrary and discriminatory enforcement. Id. at 531 (*citing* Greyned, at 108-109). Where the legislature fails to provide minimal guidelines, a statute may permit a standardless sweep that allows prosecutors, policeman, and juries to pursue their personal predilections. Id. at 532 (*citing* Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858, 75 L. Ed.2d 903 (1983)). In cases as controversial as child pornography, public pressures may especially lead judges, prosecutors and juries to pursue their own beliefs in convicting a defendant under Tenn. Code Ann. § 39-17-1003. Third, vague or uncertain statutes that operate to inhibit First Amendment freedoms inevitably

lead citizens to steer far wider of the unlawful zone than if the boundaries are clearly marked. Id. at 531 (*citing* Greyned, at 108-109).

Since the Tennessee legislature did not provide a definition of possess, the court may look to other sources such as a dictionary for a definition. United States v. Morbacher, 182 F.3d 1041, 1048 (Cal. Ct. App. 1999). Black's Law Dictionary defines "possess" as:

> To occupy in person; to have in one's actual and physical control; to have the exclusive detention and control of; to have and hold as property; to have a just right to; to be master of; to own or be entitled to.

With the advancement of computer technology, the term possess can be interpreted in many ways. There are many questions that surround technology and the idea of possession. For instance, there is a big difference between

someone who downloads a picture intentionally or someone who opens an unsolicited e-mail and finds a picture of a minor engaged in a sexually explicit act. However, in either of these situations, the computer hard drive maintains a record of these actions and so technically, the person possesses child porn vis-a-vis their hard drive memory.

The legal system's notions of possession are now outdated, especially as it relates to child pornography. As David T. Cox explains:

> Not too long ago, child pornography and obscenity were marketed and delivered by traditional means of communication-writing to inquire and order, making payment, waiting for delivery, opening a package, and saving the filth under the mattress or some equivalently secret spot. These traditional means of communication and storage were powerful evidence of the criminal intent of *mens rea* of the actor.

Today on the Internet one can now literally stumble upon someone's digital equivalent of a mattress stash, and like that damn spot that plagued Macbeth, outing the evidence is nearly impossible. Current investigative techniques for computer-based evidence will permit agents to find anything that ever appeared on your screen or passed through your wires, whether you intentionally sought out the material or not and whether you deleted it or not. In today's child pornography and obscenity market, no payment is required, no order is necessary, delivery is instantaneous and comes from a decentralized source (the Internet), and storage is automatic. None of the indicia of criminal intent once used to proscribe child pornography and obscenity apply to Internet-based materials. How one establishes mens rea in the Information Age is the question. The

> answer lies beyond mere possession. . .
>
> Cox, David T, *Litigating Child Pornography and Obscenity cases in the Internet Age*, 4 UFLJTLP 1, 148 (1999).

Computer and Internet users can easily be in possession of proscribed materials without realizing it. Personal computers have memory devices. One of these memory devices is a hard drive. Id. at 101. The hard drive storage is organized and managed by operating systems. Id. at 101. Basically, the system operates in such a way that a user may think that he or she deleted something from their computer and they did not, a "deleted file is really not a deleted file, it is merely organized differently." Id. at 101.

Many software programs also create "caches" which allow investigators to view which Web pages the user has visited. Id. at 105. So if a user clicks on a "link" to a Web page, the browser will cache the entire page, including all

graphics. Id. at 105. Some cache files allow investigators to recreate the sites that a user visited. Id. at 105. Most browsers also keep track of Web sites visited by the user, and many times a graphics viewer will keep track of the last four or five images viewed by a user. Id. at 106. With such advanced technology, it becomes apparent that the definition of possess must be defined clearly so as to allow a person of ordinary intelligence a reasonable opportunity to know what is prohibited.

Unfortunately, it seems that this new technology would make it easier for investigators and prosecutors to convict those who possess contraband materials. However, it is a double-edged sword that also makes it easier for innocent people to be wrongfully convicted. Many times an Internet user who is "surfing the Web" is exposed to child pornography without any intent on the users part to receive that type of material. Bulk e-mails, or "spam" many times

include child pornography. Id. at 111. It would not be an uncommon, or farfetched, scenario for a person to open an e-mail and find that they were sent, via spam, an unsolicited image of child pornography. However, when you click on the link, hard-core pornographic images appear. As explained above, even if an unsolicited e-mail is deleted or a user unintentionally happens upon a website containing proscribed materials, investigators can still retrieve the information. Technically, under Tennessee statutory law, because the trace evidence of these images exists, they are considered to be in the "possession" of the user.

Also, many advertisers use "pop-up" screens to promote the use of obscene materials on-line. These pop-up advertisements are unsolicited, and appear on their own when a user visits a site. The site can be non-pornographic, but the pop-up advertisements may be sexually explicit. A pop-up advertisement can appear at anytime and can

contain any image. Some pop-up advertisements may show scantily clad women with a link that says "Click here to play," or for instance, a pop-up advertisement can even just pop-up an image of a girl that says "Young and ready."

E-mail spam, pop-up ad's, and purposefully mislabeled links by pornography producers, are just some of the ways in which an innocent Internet user can unwittingly become the "possessor" of proscribed materials. Again, Cox states:

> Computers have become George Orwell's big brother, saving evidence of our every intentional and unintentional keystroke and mouse-click for government scrutiny. One wrong click on the Internet may whisk a user unwillingly to an illicit site and one unsolicited e-mail may open Pandora's box. Even if the unwary user leaves that site or deletes the e-mail immediately, his or her storage

> media will be full of evidence of that unfortunate and unintentional detour. Our current laws do not discriminate against those who merely soil themselves on such an Internet detour, however unintentional.
>
> UFLJTLP 1, 149 (1999).

Vague and overbroad statutes that do not provide citizens with enough information to know what is and is not lawful, and that allow for accidental possessors of proscribed material to be convicted of a Class E felony, are clearly unconstitutional. Almost anyone who uses the Internet is exposed to, or unknowingly possesses material that can be categorized as pornography or child pornography. Such a wide sweeping statute is in violation of the Tennessee and United States constitution.

Also, the Tennessee statute fails to provide an affirmative defense. Even under the CPPA, Congress

provided multiple affirmative defenses to the charges of possessing child pornography because Congress wanted to prevent an innocent person from being wrongfully convicted under the statute. Cox, David T, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4 UFLJTLP 1, 33 (1999). The CPPA provided that it shall be an affirmative defense if the person possessed less than three images of child pornography; and, promptly and in good faith, and without retaining or allowing any person other than a law enforcement agency to access any image or copy thereof-took reasonable steps to destroy such images, or reported the matter to a law enforcement agency and afforded that agency access to each such image. Id. at 24. This affirmative defense fails because inadvertent and accidental access to a suspect website is possible and will lead to multiple illicit images stored in an area of a person's computer that they may not know exists, much less know

how to access and delete with finality. Id. at 33. Also, as discussed above, deleting an image from a hard drive may be impossible. Id. at 33. In comparison, despite the fact that the CPPA's affirmative defense is flawed, at least Congress tried to create a defense so that the innocent interloper would be protected from prosecution. The Tennessee statute fails to provide any kind of affirmative defense and creates a wide sweep prohibition on the possession of any materials.

It is the responsibility of the Tennessee Legislature to create a statute that is more narrowly tailored to meet the State's interest of preventing the sexual exploitation of minors. To reach this goal, the Tennessee legislatures must construct a statute that provides more clear and definite meanings of what it means to "possess" proscribed materials. The Tennessee Supreme Court has long recognized that "our code recognizes the importance of

clearly defined criminal offenses. Clear definition is essential not only for the accused but also to comply with State and Federal constitutional obligations." VanArsdall v. State, 919 S.W.2d 626, 630 (Tenn. 1995).

D. TENN. CODE ANN. § 39-17-1003(b) WHICH ALLOWS THE TRIER OF FACT TO "INFER" THAT A PARTICIPANT IS A MINOR OR IS REPRESENTED OR DEPICTED AS A MINOR, DIRECTLY VIOLATES THE FREE SPEECH DECISION.

The United States Supreme Court in Free Speech unequivocally held that it was unconstitutional to subject a defendant to prosecution under a statute that infringed upon his or her fundamental First Amendment rights. Material that employs virtual imaging of children, uses youthful looking adult actors or models, or in which films are marketed as child pornography despite not containing any youthful actors, are protected forms of speech if they pass

the Miller test, and cannot be banned under a blanket prohibition such as provided for in Tenn. Code Ann. § 39-17-1003.

Tenn. Code Ann. § 39-17-1003(b) allows the trier of fact to "infer" that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor. The use of the language "infer" is no different than the "appears to be" and "conveys the impression" language of the CPPA that was struck down by the Supreme Court in Free Speech. The Supreme Court held that "appears to be" language is overbroad and vague because it chills a substantial amount of protected speech. Free Speech, at 257. The Court continued by adding that "conveys the impression" language also requires little judgment about the content of the image. Id. at 257. Webster's Third New International Dictionary, Volume II (1981) defines infer as: 2. To derive

by reasoning or implication: conclude from facts or premises, 3. Guess, surmise. Allowing the jury to "guess" or "surmise" that a participant in the proscribed material is a minor, is the same as allowing a jury to decide that the participant "appears to be" a minor, or that the material "conveys the impression" that a participant is a minor despite the fact that no actual minor was ever involved in the making of the materials. As such, Tenn. Code Ann. § 39-17-1003(b) is clearly unconstitutional.

Additionally, Tenn. Code Ann. § 39-17-1003(b) eliminates the State's burden of proving that the participant in the proscribed material is a minor. Free Speech held that, "where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor." Id. at 255. Post-

Free Speech cases have upheld that the Government has the absolute burden of proving that the images in question are that of an actual minor, even if the material in question appears to be an actual minor. U.S. v. Pearl, 324 F.3d 1210, 1214 (Utah Ct. App. 2003). As Tenn. Code Ann. § 39-17-1003(b) is written, the Government is relieved of its burden of proving that the participants in the proscribed material are under eighteen, and instead, leaves the issue open for a jury to infer the age of the participant. Again, the jury can infer the age of the participant based on the way the material is packaged or presented, and not on the actual content of the material. The Tennessee statue is in direct violation of the Supreme Court holding in Free Speech, and in effect places the impossible evidentiary burden of proving that the participant is not a minor on the defendant.

Furthermore, Tenn. Code Ann. § 39-17-1003(b) eliminates an affirmative defense. By dictating that the jury

infers that a participant is a minor allows for the conviction of a defendant even if he or she can prove that the participant is not a minor. The defense is incomplete and insufficient because a defendant charged with possessing proscribed works cannot defend on the ground that the film uses only adult actors. Free Speech, at 256. The Tennessee statute provides no protection for a defendant who can prove that the images were produced using computer imaging or used with adult actors. Id. at 256. Tenn. Code Ann. § 39-17-1003(b), as did the CPPA, leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones, or images or materials using youthful looking adults. Id. at 256.

III. CONCLUSION

The Tennessee General Assembly has explained that the purpose of the child abuse and child sexual abuse laws is to "prevent further abuses, to safeguard and enhance the welfare of children, and to preserve the family life." Green v. Metropolitan Government of Nashville, No. M2001-01561-COA-R3-CV, WL 1751436, 4 (Tenn. Ct. App. 2002). Tennessee's sexual exploitation statute goes far beyond the intended goals of the State legislature and indiscriminately and viciously tramples upon the fundamental rights to free speech as afforded to the citizens of this State by both the Tennessee and United States constitutions. An application of a Free Speech analysis to Tennessee's sexual exploitation statute, Tenn. Code Ann. § 39-17-1003, makes it evident that the statute is overbroad, vague, and therefore unconstitutional. As such, it would be in violation of Article 1 §§ 8, 9 and 19 of the Tennessee Constitution and the First and Fourteenth Amendments to

the United States Constitution to continue to prosecute the defendant.

WHEREFORE the Defendant, Gregory Harwood, moves this Honorable Court to dismiss all charges against him due to the overbroad and vague construction of Tennessee's sexual exploitation of a minor statute, Tenn. Code Ann. § 39-17-1003.

Respectfully submitted,

/s/_____
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/s/_____
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Court of Criminal Appeals of Tennessee, at Knoxville.

STATE of Tennessee
v.
Richard Allen BUTLER
and
State of Tennessee
v.
Re'Licka Dajuan Allen.

No. E2004-00359-CCA-R9-CD.
Oct. 27, 2004 Session.
March 30, 2005.
Application for Permission to Appeal
Denied by Supreme Court
Aug. 22, 2005.

Direct Appeal from the Criminal Court for Knox County, Nos. 76909, 77455; Richard Baumgartner, Judge, and Mary Beth Leibowitz, Judge.

Gregory P. Isaacs, Knoxville, Tennessee, for the appellant, Richard Allen Butler.

James A.H. Bell, Joan M. Stallard, and Richard L. Gaines, Knoxville, Tennessee, for the appellee, Re'Licka Dajuan Allen.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin Allen, Assistant

District Attorney General, for the appellee/appellant, State of Tennessee.

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. McLIN, JJ., joined.

OPINION

ALAN E. GLENN, J.

The issues presented by these consolidated Rule 9 interlocutory appeals are whether Tennessee's sexual exploitation of a minor statute is constitutional in light of *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), and whether the trial court may require the State to provide the defense with a copy of the alleged child pornography that forms the basis for the prosecution's case. As to these questions, the trial courts ruled that the State had to provide the defense with copies of the alleged pornographic materials and that while a portion of the statute is unconstitutional, the remainder is

not. Following our review, we affirm the rulings of the trial courts.

FACTS AND PROCEDURAL HISTORY

On April 8, 2003, Richard Allen Butler was charged by the Knox County Grand Jury with one count of sexual exploitation of a minor for possessing materials that included a minor engaged in sexual activity, in violation of Tennessee Code Annotated section 39-17-1003. In a separate case, Re'Licka Dajuan Allen was charged by the Knox County Grand Jury on June 17, 2003, with one count of sexual exploitation of a minor for possessing materials that included a minor engaged in sexual activity, and with two counts of aggravated sexual exploitation of a minor for possessing, with the intent to transport and with the intent to distribute, materials that included a minor engaged in sexual activity, in violation of Tennessee Code Annotated section 39-17-1004. Both cases involved material located on the

defendants' computers. In Allen's case, the material was originally discovered by a computer repair technician at a store where Allen had taken his computer for repair. The technician informed his manager of his discovery, and the manager in turn contacted Knox County law enforcement.

Counsel for both defendants filed motions for discovery, including requests that the State provide them with copies of the computer hard drives and "other computer materials" for their independent examination and review. The State refused, offering to make the material available for examination by defense counsel and defense computer experts at the sheriff's department, but contending that it would constitute a violation of the sexual exploitation statute for the material to be removed from the custody and control of the sheriff's department. In response, counsel for both defendants filed motions to compel the production of

the evidence. In addition, counsel for Butler filed a motion to dismiss, arguing that under a post- *Free Speech Coalition* analysis, the statute was "unconstitutionally overbroad and vague" and "chill[ed] a substantial amount of protected speech under the First Amendment." Counsel for Allen also filed a "Notice to Challenge of Constitutionality of Statute," indicating his intention of raising a challenge to the statute's constitutionality in future motions or pleadings.

On September 19, 2003, the Butler trial court entered an order granting Butler's Rule 16(a)(1)(C), Tennessee Rules of Criminal Procedure, motion to copy evidence. The court ordered the State to provide Butler with a copy of his computer hard drive, along with copies of any alleged pornographic images of minors which had been seized from him; that Butler's counsel keep the material in a secure location accessible only to counsel; that the material be

viewed only by counsel, counsel's employees and agents; and that the material be returned upon the completion of the matter.

On December 9, 2003, the Butler trial court entered a "Memorandum Opinion and Order" in which it concluded that subsection (b) of the sexual exploitation of a minor statute was unconstitutional under *Free Speech Coalition* because it could apply to material in which an actual minor was not used. The court further concluded, however, that the remaining subsections of the statute were constitutional and could be severed from the unconstitutional subsection and enforced under the doctrine of elision. Accordingly, the trial court denied the defendant's motion to dismiss and ordered that the State be allowed to amend the indictment to eliminate any reference to the unconstitutional portion of the statute.

Butler subsequently sought permission to file an interlocutory appeal of the trial court's ruling on the constitutionality of the statute, and the State sought permission to appeal the rulings on both the constitutionality and discovery issues. On February 5, 2004, the trial court granted both parties' motions to file an interlocutory appeal, and on March 22, 2004, this court granted the parties' applications for interlocutory review pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure.

In Allen's case, a hearing on his motion to compel was held at which the State presented one witness, Carlton Bryant, an attorney employed at the Knox County Sheriff's Department. Bryant testified that his understanding of the law was that the sheriff's department could not allow counsel to take a copy of the computer hard drive from the

department because the sexual exploitation statute did not contain any exemption for defense counsel to be given child pornography. He said they would, however, accommodate counsel and counsel's computer experts by mirror-imaging the hard drive and allowing them to examine the copy while it remained in the "custody and control" of the department. He testified that they contemplated setting aside a conference room for that purpose and would arrange a schedule that was convenient for counsel and his experts.

Herbert Mack, Allen's expert computer witness, described in detail the various programs and viruses by which material can be both deliberately and inadvertently downloaded into a computer and estimated that it would take him approximately one week of intensive twelve-to fourteen-hour days to complete an examination of Allen's computer hard drive. He testified he would probably require

the assistance of support personnel from his office and, in addition, would need to consult regularly with counsel with respect to whether any sexually explicit files he found on the computer qualified as child pornography. He said that, given the large number of images allegedly contained on the computer, he would not be able to remember the specifics of the information without taking the computer hard drive from the sheriff's department.

Mack expressed concern about working from a "mirror image" rather than the hard drive itself, testifying that the computer programs in existence did not create true mirror images:

A Well, the question-what I heard before was providing me with a mirror image. Okay. If we're talking about me working on the original computer, no, I don't need another computer as long as I can, you know, load my tools and

take my tools off. If what you're going to give me is a mirror image, my concern there is that I'm not getting all of the data that's there.

Q And why is that? If it's a mirror image wouldn't you just get everything that's in the mirror?

A No, sir.

Q Why not?

A A mirror image is a misnomer, okay. The computer programs that you have right now, okay, are for the purpose of recovering good data. Okay. So if a file has been ordered damaged or erased it's not going to be on the image.

Mack conceded that his examination of the actual hard drive would entail reconnecting the original personal computer equipment, turning the computer on, and loading his software file-searching tools, and he agreed that in the

process of booting up the Windows operating system the contents of the hard drive would be changed. However, according to his testimony, booting the computer would not alter either the file creation date or last accessed date of the images in question. Mack testified he was familiar with "EnCase," a forensic examination software utility available exclusively to law enforcement, but he was not aware that it had been approved by several federal district and appellate courts as a "non-invasive forensic examination tool."

The Allen trial court granted Allen's Rule 16(a)(1)(C), Tennessee Rules of Criminal Procedure, motion to compel and copy evidence, entering protective orders on December 9, 2003, and on January 5, 2004, which required the State to provide Allen's counsel with a mirror image copy of the computer hard drive rather than the actual hard drive itself. On February 23, 2004, the trial court granted the State's

motion for an interlocutory appeal of the discovery ruling, and on March 30, 2004, this court granted the State's application for interlocutory review and consolidated the two cases for appeal. We will review these rulings.

ANALYSIS

I. Constitutionality of Sexual Exploitation of a Minor Statute

Tennessee Code Annotated section 39-17-1003 provides as follows:

(a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:

(1) Sexual activity; or

(2) Simulated sexual activity that is patently offensive.

(b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its

title, text, visual representation or otherwise represents or depicts the participant as a minor.

(c) A violation of this section is a Class E felony. The statute defines a "minor" as "any person who has not reached eighteen (18) years of age." Tenn. Code Ann. § 39-17-1002(3). "Material" is defined as:

(A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation;

(B) Any statue, figure, theatrical production or electrical reproduction; or

(C) Any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval.

Id. § 39-17-1002(2). "Possess" is not defined in the statute. Butler argues that the trial court correctly ruled subsection

(b) of the statute unconstitutional under *Free Speech Coalition* but that it erred in concluding that the remainder of the statute was constitutional and enforceable. He contends that the terms "material" and "possess" in subsection (a) are unconstitutionally vague and overbroad and, as such, render the entire statute unconstitutional on its face. The State disagrees, arguing that the Tennessee statute, unlike the federal statute at issue in *Free Speech Coalition,* restricts only the possession of sexually explicit material which includes a minor as a participant. By the State's argument, subsection (b) merely allows for a permissible inference that a participant is a minor without eliminating the minority of the participant as an essential element of the offense and without shifting the burden of proof to the defendant. Since this issue involves the interpretation of a statute and hence is a matter of law, our review is *de novo* with no presumption of correctness given

to the trial court's ruling. *See State v. McKnight,* 51 S.W.3d 559, 562 (Tenn. 2001); *Planned Parenthood of Middle Tennessee v. Sundquist,* 38 S.W.3d 1, 7 (Tenn. 2000).

In *Free Speech Coalition,* the United States Supreme Court struck down as unconstitutionally overbroad two provisions of the Child Pornography Prevention Act of 1996 ("CPPA"), 18 U.S.C. § 2251 *et seq.*, which included among the definitions of child pornography: (1) " 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture' that 'is or appears to be, of a minor engaging in sexually explicit conduct' "; and (2) "any sexually explicit image that was 'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts 'a minor engaging in sexually explicit conduct.'" 535 U.S. at 241-42, 122 S. Ct. at 1397 (quoting 18 U.S.C. §

2256(8)(A), (D)). The Court observed that these definitions included material that neither qualified as obscenity under *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed.2d 419 (1973), nor caused direct harm to minors by involving the use of an actual child in the production process, as explained in *New York v. Ferber,* 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982). The Court concluded, therefore, that the definitions reached a substantial portion of speech protected under the First Amendment and, thus, were unconstitutionally overbroad. *Free Speech Coalition,* 535 U .S. at 251-55, 122 S. Ct. at 1402-05.

In finding subsection (b) of the Tennessee statute unconstitutional, the Butler trial court relied in part on an Arizona child pornography case, *State v. Hazlett,* 205 Ariz. 523, 73 P.3d 1258 (Ariz. Ct. App. 2003), which analyzed

the constitutionality of Arizona's sexual exploitation statutes in light of *Free Speech Coalition.* In that case, the Arizona Court of Appeals concluded that the state's sexual exploitation of a minor statute, Arizona Revised Statutes section 13-3553, was not overly broad because it was limited in its scope to depictions of an actual, live minor but that section 13-3556 of the Statutes, which allowed the trier of fact "to infer 'that a participant is a minor if the visual depiction or live act through its title, text or visual representation depicts the participant as a minor,' " was unconstitutionally overbroad because it "would permit a prosecution and conviction where no actual child was involved in the material or live act." *Hazlett,* 73 P.3d at 1264 n. 10 (quoting Ariz. Rev. Stat. § 13-3556). The *Hazlett* court, therefore, upheld the constitutionality of section 13-3553 while ruling section 13-3556 unconstitutional. Because the *Hazlett* court's conclusion on

the constitutionality of section 13-3556 was set out in a footnote rather than the body of the opinion, it did not include any analysis of the issue.

Recently, however, another state has rejected a post- *Free Speech Coalition* challenge to the constitutionality of its child pornography statutes based on language that is virtually identical to subsection (b) of Tennessee's sexual exploitation of a minor statute. In *State v. Michael J. Morris,* No. 04CA0036, 2005 WL 356801, at *3 (Ohio Ct. App. Feb. 16, 2005), the Ohio Court of Appeals considered whether its child pornography statutes were rendered unconstitutionally overbroad due to the following language, contained in sections 2907.321(B)(3) and 2907.322(B)(3) of the state's Revised Code: "In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material

or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor." After first observing that the wording of the statutes limited its application to material in which an actual child was used, the Ohio court concluded that the provision at issue merely allowed for the State to prove its case through circumstantial evidence and, thus, did not violate the holding in *Free Speech Coalition:*

Preliminarily, this Court notes that acts of the General Assembly enjoy a strong presumption of constitutionality. Additionally, R.C. 2907.321 and R.C. 2907.322 are distinguishable from the CPPA provisions, because they only apply to pornography created using real children. There is no indication that the provision contained in R.C. 2907.321(B)(3) and R.C. 2907.322(B)(3) was intended to encompass virtual child pornography. Rather, we read the

provision to permit what the common law has always permitted, that the State may prove its case with circumstantial evidence.

Accepting appellant's position regarding the statutes in question would render them nearly impossible to enforce. Under appellant's contention, the State could only constitutionally convict a defendant of possession of child pornography through two methods: 1) identifying the child depicted and verifying the child's age, or 2) soliciting expert testimony that the child depicted is a minor and that the image in question had not been digitally altered. Under the first scenario, the State would have nearly no avenue with which to convict a defendant when the defendant has used the anonymity of the Internet to obtain child pornography. In the second scenario, circumstantial evidence that the images contain minors would be of little value without the

State calling an expert to dispel any possibility, however remote, that the images in question were digitally altered. This Court declines to read such a burden into Ohio's child pornography laws.

Id. at *4 (citations omitted).

In arguing that subsection (b) of the Tennessee statute merely allows for a permissible inference, the State seeks to have us interpret the Tennessee statute in the same manner as the Ohio Court of Appeals has interpreted the equivalent portion of its statute above. The State points out that our case law recognizes that a permissive inference, unlike a mandatory presumption, does not place any burden of proof on a defendant and does not violate a defendant's due process rights. *See State v. Sensing,* 843 S.W.2d 412, 417 (Tenn. 1992); *State v. Bolin,* 678 S.W.2d 40, 44-45 (Tenn. 1984); *State v. Bonam,* 7 S.W.3d 87, 89 (Tenn. Crim. App.

1999); *State v. Woodson,* 705 S.W.2d 677, 679 (Tenn. Crim. App. 1985). However, the United States Supreme Court opinion on which many of our decisions have relied for this proposition, and which the State quotes in its brief, cautions that "in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *County Court of Ulster County, New York v. Allen,* 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed.2d 777 (1979).

We are persuaded by Butler's argument that subsection (b) of the sexual exploitation of a minor statute, by allowing a jury to infer that a participant is a minor "if the material through its title, text, visual representation *or otherwise represents or depicts the participant as a minor,*"

Tenn.Code Ann. § 39-17-1003(b) (emphasis added), comes too close to permitting a conviction based on the possession of material in which an actual minor is not involved, in violation of the holding in *Free Speech Coalition.* Unlike the Ohio Court of Appeals, we do not believe that eliding the subsection will require the State in every case to put on expert testimony with respect to whether the participant is a child or merely a youthful-looking adult or whether the image is of a real as opposed to a "virtual" child. Indeed, there may well be cases in which the possibility that the image was digitally altered or that the person depicted is an adult is simply too remote for any jury to accept, regardless of whether the State presents any expert testimony on the issue. For example, a case involving an obvious home video of a prepubescent child may not require any proof beyond the alleged pornographic material itself. In this respect, we note that the Sixth Circuit Court of Appeals has concluded

that *Free Speech Coalition* does not place any "heightened" evidentiary burden on the prosecution in a child pornography case.

Our conclusion that the evidence is sufficient in this case necessarily assumes that *Free Speech Coalition* did not impose a special or heightened evidentiary burden on the Government to prove that images are of real children. The question of whether the images are virtual or real is one of fact, to be determined by evidence about which argument can be made to the jury. Other circuits have rejected the argument that the Government must meet a higher evidentiary burden than before *Free Speech Coalition*. *United States v. Farrelly*, 389 F.3d 649, 653-54 (6th Cir. 2004) (footnote omitted).

On the other hand, there will certainly be some cases in which it will not be such a simple matter for the jury to

determine if the material contains an actual minor. In such cases, we believe a real possibility exists that the jury, should subsection (b) be allowed to stand, will base its finding that a participant is a minor not on the images themselves, but instead on the manner in which they are labeled, promoted, or depicted. The testimony of the computer technician who discovered the alleged pornographic images on Allen's computer is illustrative of this point. When asked at the general sessions court hearing on Allen's motion to suppress whether he had told the police detective that the name attached to the computer file, "Child Pedo," indicated to him that it contained child pornography, he replied with obvious sarcasm, "'Child Pedo'; yes. What do you think it means?" To be fair, he further testified that he believed the material to be child pornography based on his viewing of the contents of the file, which, he said, consisted of an apparently amateur film of a physically

undeveloped young girl engaged in sexual intercourse with an adult man. Nonetheless, we believe the technician's reply indicates that, like many in a similar situation, he may have been predisposed to conclude that the material was child pornography based on the name of the computer file in which it was contained.

Butler contends that the wording of subsection (b) "in effect places the impossible evidentiary burden of proving that the participant is not a minor on the defendant." While we do not accept his characterization of the evidentiary burden as "impossible," we agree that it should fall on the prosecution rather than the defense. As Butler points out, the *Free Speech Coalition* Court, in rejecting the government's argument that an affirmative defense in the CPPA, applicable to defendants charged with non-possession

offenses, saved the challenged provisions from unconstitutionality, noted that:

In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.

Free Speech Coalition, 535 U.S. at 255-56, 122 S. Ct. at 1404. Even if the State is required to put on expert testimony in every case to "dispel any possibility, however remote," *Michael J. Morris,* 2005 WL 356801, at *4, that the material contains images of a virtual child or an adult masquerading as a child, we do not think the burden is too great for the State to bear, especially in light of the fact that sexual exploitation of a minor, aggravated sexual

exploitation of a minor, and especially aggravated sexual exploitation of a minor constitute Class E, C, and B felonies in Tennessee. *See* Tenn. Code Ann. §§ 39-17-1003(c) (making sexual exploitation of a minor a Class E felony); 39-17-1004(a)(3) (making aggravated sexual exploitation of a minor a Class C felony); 39-17-1004(b)(3) (elevating aggravated sexual exploitation of a minor to a Class B felony when the material is obscene); 39-17-1005(c) (making especially aggravated sexual exploitation of a minor a Class B felony).

Although the Butler trial court found subsection (b) of the statute unconstitutional under *Free Speech Coalition,* it concluded that the rest of the statute passed constitutional muster and was enforceable under the doctrine of elision. Under this doctrine, a court may strike a portion of a statute that it finds to be unconstitutional while retaining the

remainder of the statute as constitutional and enforceable, as long as doing so does not undermine the legislative intent behind the statute. *Planned Parenthood,* 38 S.W.3d at 22 (citing *State ex. rel Barker v. Harmon,* 882 S.W.2d 352, 355 (Tenn. 1994)). "[W]hen a conclusion can be reached that the legislature would have enacted the act in question with the unconstitutional portion omitted, then elision of the unconstitutional portion is appropriate." *In re Swanson,* 2 S.W.3d 180, 189 (Tenn. 1999).

Butler contends, however, that the entire statute is unconstitutional, arguing that subsection (a) contains terms that are unconstitutionally vague and overbroad in light of the holding in *Free Speech Coalition.* A statute is void for vagueness if it fails to provide "fair notice to citizens of prohibited activities and minimal guidelines for enforcement to police officers and the courts." *State v.*

Torres, 82 S.W.3d 236, 246 (Tenn. 2002). A statute violates the overbreadth doctrine when, in addition to unprotected speech, it prohibits or "chills" a substantial amount of speech that is protected under the First Amendment. *Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. at 1404. Butler first argues that the term "material" in the Tennessee statute is unconstitutionally overbroad because any sexually explicit material, regardless of whether it qualifies as obscenity under *Miller*, is proscribed as long as it contains images of persons who " *appear* to be less than eighteen." (emphasis in original). He contends that the "sweeping definition of 'material' allows for prosecution for many protected forms of speech, such as 'virtual child porn,' films that are marketed as child pornography but do not contain any minor actors, films or pictures using adult actors or models that appear to be under age eighteen, and text stored on a computer hard drive."

Butler's argument on this issue, however, depends on reading subsection (a) in conjunction with subsection (b) of the statute. Apart from subsection (b), Tennessee's sexual exploitation of a minor statute proscribes only the knowing possession of material, whether it be pictures, drawings, videos, computer disks, etc., which includes a minor, defined as a person less than eighteen, engaged in either sexual activity or simulated sexual activity that is patently offensive. Tenn. Code Ann. §§ 39-17-1002(3), -1003(a). The statute contains no language defining child pornography as material that merely "appears to be" of a minor or that "conveys the impression" that a minor is involved. Thus, unlike the CPPA, Tennessee's sexual exploitation of a minor statute, severed from subsection (b), does not proscribe the possession of "virtual" child pornography or of material containing youthful-looking adults rather than actual children as participants.

Butler also argues that the term "possess," which is not defined in the statute, is unconstitutionally vague due to the "many questions" that "surround computer technology and terminology and the concept of possession." As an example, he argues that someone who unintentionally opens an unsolicited E-mail containing a sexually explicit image of a minor possesses the image by virtue of the hard drive's memory to the same extent as does the person who deliberately downloaded the image from the Internet. However, "[t]he fact that a statute applies in a wide variety of situations and must necessarily use words of general meaning does not render it unconstitutionally vague." *State v. Webb*, 130 S.W.3d 799, 828 (Tenn. Crim. App. 2003) (citing *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990)). Allen's computer expert testified that it is possible to determine not only when an image was created but also when the file containing the image was accessed. If such is

the case, presumably a qualified computer forensic examiner will be able to distinguish between a file accidentally placed on a computer hard drive by the opening of an unsolicited E-mail and a file intentionally downloaded from the Internet, based on the number of times the file has been opened and viewed. "[A] statute is not unconstitutionally vague 'which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.'" *State v. Prater,* 137 S.W.3d 25, 32 (Tenn. Crim. App. 2003) (quoting *State v. Wilkins,* 655 S.W.2d 914, 916 (Tenn. 1983) (internal quotations omitted)). When subsection (b) is elided, the sexual exploitation of a minor statute gives adequate warning of the proscribed conduct, *i.e.,* the knowing possession of sexual material involving a minor, and is sufficient to prevent the arbitrary and discriminatory enforcement on the part of the authorities. Accordingly, we

affirm the Butler trial court's ruling and conclude that while subsection (b) of the statute is unconstitutional under *Free Speech Coalition*, the remainder of the statute is constitutional and may be enforced apart from the unconstitutional provision.

II. Discovery Ruling

The State contends that the trial courts erred in directing it to turn over the child pornographic images, or "contraband," to the defendants as discovery. It notes that the sexual exploitation statute, unlike Tennessee's obscenity statute, contains no exception for the possession of such material by defense counsel or experts,[1] and cites several cases from other jurisdictions in which an appellate court has upheld the lower court's ruling that the government was not required to copy and disseminate such evidence to the defense. The defendants point out that, in contrast to the

cases at bar, many of the opinions on which the State relies involve an appeal following a conviction, where the appellate court has found that no prejudice resulted to the defendant from the trial court's ruling. They argue that the trial courts in the cases at bar acted within their discretion and in accordance with the rules on discovery in ordering the production of the evidence. We agree with the defendants.

FN1. The obscenity statute states in pertinent part that "[i]t is an exception to this section that the obscene material is possessed by a person having scientific, educational, governmental or other similar justification." Tenn. Code Ann. § 39-17-902(e) (2003).

Tennessee Rule of Criminal Procedure 16(a)(1)(C) provides:

Upon request of the defendant, the State *shall* permit the

defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, and which are material to the preparation of the defendant's defense or are intended for use by the State as evidence in chief at the trial, or were obtained from or belong to the defendant.

Tenn. R.Crim. P. 16(a)(1)(C) (2004) (emphasis added). In ordering the production of the evidence, the Allen trial court relied on the Butler trial court's similar ruling, as well as the decisions of appellate courts in Arizona and California, as set forth in *Cervantes v. Cates,* 206 Ariz. 178, 76 P.3d 449 (Ariz. Ct. App. 2003), and *Westerfield v. Superior Court of San Diego County,* 99 Cal. App. 4th 994, 121 Cal.Rptr.2d 402 (Cal. Ct. App. 2002). The prosecution in both of these cases, as in the cases at bar, refused the defendants' requests

for copies of materials containing alleged child pornography on the basis that the dissemination of such evidence would constitute a violation of the pertinent child pornography statutes.

Unlike Tennessee's statute, the statute at issue in *Westerfield* contained an express exemption stating that it did not apply to the activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses under the statute. *Id.* at 404 n. 3. Based on that language, the State argued that *only* law enforcement and prosecuting agencies were exempted from prosecution under the statute. It contended that, had the legislature intended otherwise, it would have written a specific exemption for defense counsel into the statute. *Id.* The *Westerfield* court rejected that argument, writing:

Nothing in the plain language of section 311.1 prohibits the copying of the images for use by the defense in preparing for trial. The People's interpretation of the statute-that the deputy district attorney would violate the law if he copied the images for the defense-not only defeats the purpose of the law and exalts absurdity over common sense, but it is also logically flawed. If the exemption in section 311.1, subdivision (b) allows the prosecutor to duplicate and distribute the images for prosecution purposes as the People readily concede, then the prosecutor can duplicate and distribute the images with impunity to any of the players in the criminal action-to the court pretrial as the prosecutor did on the motion here, to the jury at trial and/or to the defense as part of the prosecutor's discovery duties. In addition, to the extent there is any genuine concern about the disposition of the material provided to the defense, the court can issue a protective order limiting disclosure to counsel

and their agents or order the return of the images to the court for destruction at the conclusion of the case under section 312.

Finally, requiring the defense to view-and apparently commit to memory-the "thousands" of images at the computer crimes office obviously impacts Westerfield's right to effective assistance of counsel and his right to a speedy trial.

Id. at 404-05.

In *Cervantes,* the Arizona Court of Appeals rejected a similar argument that the prosecutor's dissemination to defense counsel of copies of videotapes and photographs, which allegedly contained pornographic images of children, would constitute a violation of that state's child pornography laws. 76 P.3d at 456. As in the cases at bar, the prosecutor denied the defendant's request for copies of the

evidence but offered to make it available for the defendant and his counsel's review at the jail, with a detective assigned to observe their handling of the material. *Id.* at 451. After reviewing the material in this manner and being unable to complete their examination, the defendant and his counsel requested that the trial court either assign a different detective for a second viewing or have the prosecutor provide copies of the material to them for their independent review. *Id.* at 451-52. The trial court denied the request, and the defendant then filed a "special action petition from the trial court's order denying his motion to compel." *Id.* at 452.

In reversing the trial court, the *Cervantes* court distinguished other cases which have reached a different result on the basis that they came before the reviewing courts on a different procedural posture. *Id.* at 455 ("Those

cases [*United States v. Horn,* 187 F.3d 781 (8th Cir. 1999); *United States v. Kimbrough,* 69 F.3d 723 (5th Cir. 1995); *State v. Ross,* 792 So.2d 699 (Fla. Dist. Ct. App. 2001); *United States v. Husband,* 246 F.Supp.2d 467 (E.D.Va. 2003)] are distinguishable both because the courts were analyzing whether any possible error was harmless and, in at least one of those cases, the government was offering to bring the material to defense counsel to allow him to review them in the convenience of his office."). Relying on the reasoning of the *Westerfield* court, the *Cervantes* court concluded that the possession or distribution of child pornography that occurs in the context of the prosecution of a case does not constitute a violation of Arizona's child pornography statutes:

The State's final argument is that A.R.S. § 13-3553 does not provide any immunity to defense counsel for his possession

of the materials. We reject that argument as unpersuasive and inconsistent with the purpose of section 13-3553 to the extent that defense counsel uses the material solely for purposes of defending this case. Arizona's child pornography laws were not aimed at prohibiting defense counsel from preparing for trial, but to prohibit the spread of child pornography....

Accepting the State's argument would require this Court to hold that because section 13-3553 does not provide any immunity for law enforcement officials, police possession of contraband, be it drugs or child pornography, would be illegal. Similarly, the State's showing of the pornography at trial and even this Court's receipt and possession of the pornographic materials on appeal would be illegal. Provided that defense counsel, like the police, prosecutors and court personnel use the material solely for their investigation,

prosecution, defense and resolution of the case at hand, neither their possession of it nor the State's copying of it solely for such purposes should expose them to criminal liability.

Id. at 456-57 (citations and footnote omitted).

We find the reasoning of the *Westerfield* and *Cervantes* courts to be persuasive and, likewise, conclude that the possession, copying, or distribution of child pornographic materials does not constitute a violation of Tennessee's sexual exploitation of a minor statutes so long as it occurs in the context of the prosecution or defense of a case under the statute. In both Allen's and Butler's cases, the trial courts entered protective orders to keep the evidence secure and to confine its dissemination to defense counsel and counsel's agents and employees in the preparation of their defense. We find these orders reasonable and appropriate, especially

given Allen's computer expert's testimony with respect to the extensive and exhaustive work entailed in his examination of Allen's computer hard drive. Accordingly, we conclude that the trial courts did not err in granting the defendants' motions to compel the production of the evidence.

Allen raises as an additional issue whether the evidence should be excluded entirely based on the State's failure to comply with the rules of discovery. Exclusion of evidence, however, is an extreme sanction which is not warranted except when a violation of Rule 16 has resulted in actual prejudice to a party which "cannot be otherwise eradicated." *State v. James*, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984). No such prejudice has occurred in this case. Accordingly, we deny his request for the exclusion of the evidence.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the rulings of the trial courts.

RELEVANT TENNESSEE STATUTES

Title 39. Criminal Offenses, Chapter 17. Offenses Against Public Health, Safety, and Welfare. Part 10, Sexual Exploitation of Children.

§ 39-17-1002. Definitions.

The following definitions apply in §§ 39-17-1002--39-17-1007 unless the context requires otherwise:

(1) 'Community' means the judicial district, as defined by § 16-2-506, in which a violation is alleged to have occurred;

(2) 'Material' means:

(A) Any picture, drawing, photograph, motion picture film, videocassette tape or other pictorial representation;

(B) Any statue, figure, theatrical production or electrical reproduction; or

(C) Any text or image stored on a computer hard drive, a computer disk of any type, or any other medium designed to store information for later retrieval;

(3) 'Minor' means any person who has not reached eighteen (18) years of age;

(4) 'Patently offensive' means that which goes substantially beyond customary limits of candor in describing or representing such matters;

(5) 'Promote' means to finance, produce, direct, manufacture, issue, publish, exhibit or advertise;

(6) 'Prurient interest' means a shameful or morbid interest in sex;

(7) 'Sexual activity' means any of the following acts:

(A) Vaginal, anal or oral intercourse, whether done with another person or an animal;

(B) Masturbation, whether done alone or with another human or an animal;

(C) Patently offensive, as determined by contemporary community standards, physical contact with or touching of a person's clothed or unclothed genitals, pubic area, buttocks or breasts in an act of apparent sexual stimulation or sexual abuse;

(D) Sado-masochistic abuse including flagellation, torture, physical restraint, domination or subordination by or upon a person for the purpose of sexual gratification of any person;

(E) The insertion of any part of a person's body or of any object into another person's anus or vagina, except when

done as part of a recognized medical procedure by a licensed professional;

(F) Patently offensive, as determined by contemporary community standards, conduct, representations, depictions or descriptions of excretory functions; or

(G) Lascivious exhibition of the female breast or the genitals or pubic area of any person.

§ 39-17-1003. Sexual Exploitation of a Minor.

(a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:

(1) Sexual activity; or

(2) Simulated sexual activity that is patently offensive.

(b) A person possessing material that violates subsection (a) may be charged in a separate count for each individual image, picture, drawing, photograph, motion picture film,

videocassette tape, or other pictorial representation. Where the number of materials possessed is greater than fifty (50), the person may be charged in a single count to enhance the class of offense under subsection (d).

(c) In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence, in determining whether a person knowingly possessed the material, or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

(d) A violation of this section is a Class D felony; however, if the number of individual images, materials, or combination of images and materials, that are possessed is more than fifty (50), then the offense shall be a Class C felony. If the number of individual images, materials, or

combination of images and materials, exceeds one hundred (100), the offense shall be a Class B felony. (e) In a prosecution under this section, the state is not required to prove the actual identity or age of the minor.

Respectfully submitted,

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